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FEDERAL LAND POLICY AND MANAGEMENT ACT'S EFFECT ON THE RIGHT-OF-WAY APPLICATION FOR THE MIDDLE FORK RESERVOIR ON THE POWDER RIVER, WYOMING*

Rights-of-Way: Federal Land Policy and Management Act of 1976—Rights-of-Way: Applications

Given the specific facts presented by the right-of-way application, where the use of a large percentage (71%–89%) of the reservoir water is not known, the Secretary cannot make an "informed decision" on the application, as required by Title V of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (Oct. 21, 1976), 43 U.S.C. § 1761 *et seq.* (1976) (FLPMA), and therefore may not proceed to consider the application.

The apparent discretion granted to the Secretary in section 1761 of FLPMA which states that the Secretary shall require such information "which he deems necessary" to grant a right-of-way must be interpreted in light of sec. 1764's specific mandate to submit a plan of operation, sec. 1765's specific mandate to include protective terms and conditions, and Congress' reference to "the use, or intended use" of the right-of-way. Therefore, information about the intended use—as opposed to possible uses—of the water is necessary to the Secretary's decision whether to grant the application, under the circumstances presented by this case.

Rights-of-Way: Applications—Rights-of-Way: Conditions and Limitations—Regulations: Generally

The Secretary could establish general policy in right-of-way regulations which would provide specific guidelines for determining how much uncertainty about use will prevent the processing of right-of-way applications.

M–36900

January 12, 1979

OPINION BY

OFFICE OF THE SOLICITOR

MEMORANDUM

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT

FROM: SOLICITOR

SUBJECT: FEDERAL LAND POLICY AND MANAGEMENT ACT'S EFFECT ON THE RIGHT-OF-WAY APPLICATION FOR THE MIDDLE FORK RESERVOIR ON THE POWDER RIVER, WYOMING

ISSUE:

Must an applicant for a right-of-way to store water on the public lands under Title V of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2776 (Oct. 21, 1976), 43 U.S.C. § 1761 *et seq.* (1976) (FLPMA) disclose the place of use and use to which that water will be put before a decision can be made on that right-of-way?

SUMMARY OF RESPONSE:

Yes. Given the almost complete lack of information and uncertainty regarding the intended use of al-

*Not in Chronological Order.

most all this water, the fact that it may be used in ways whose impacts are now unknown or ill-understood, and the fact that the permittee may not decide for many years how to use the water, I hold that, on these facts, the Secretary must know the intended use(s) of the bulk of the water before acting on a right-of-way application to store water on the public lands.

BACKGROUND:

The Powder River Reservoir Corp. proposes to construct an earthfill dam which would create a 50,000-acre-foot reservoir on the Middle Fork of the Powder River. The proposed reservoir would generate approximately 25,000 acre-feet of water for use, and would inundate 1,160 acres of land. Of this, 141 acres are public lands. The reservoir corporation applied to the Bureau of Land Management for a right-of-way to inundate this public land on July 16, 1973. While the application was pending, Congress enacted FLPMA, Subchapter V of which establishes new requirements for right-of-way grants.

This memorandum analyzes how this application must be treated under FLPMA. It clarifies and supersedes the earlier opinion of the Deputy Solicitor on this subject, dated Sept. 12, 1977. Because of the important and difficult question involved, I have carefully reviewed the matter.

The applicant corporation is composed of 22 ranchers. Through a contract between it and Carter Oil Co. (Carter), a subsidiary of Exxon, Carter has complete control of 25,000 acre-feet, or a minimum of 71 percent of the designated water use.[1] Carter has contracted to sell half its water entitlement to Atlantic Richfield Co. (ARCO).

Under the terms of the contract, the reservoir corporation will use the balance of the water for agricultural purposes. This will amount to, on the average, 6,640 acre-feet or 18 percent of the designated water use.[2]

The Bureau of Land Management requested information from Carter and ARCO on intended water use. Carter has responded: "As we have consistently advised you, we have no firm and definite plans [for use of the water] to disclose. That has been the case and is still the case."[3] Similarly, ARCO has informed BLM: "Atlantic Richfield cannot commit to an immediate use of water from the Middle Fork Reservoir * * *"[4]

[1] Carter also has responsibility for over half of the operation and maintenance costs.

[2] The permitted contract range is 3,700 acre-feet (10.57%) to 10,000 acre-feet (28.57%).

[3] July 26, 1977 letter to BLM Wyoming State Director from Carter's President. Carter justifies its lack of specific plans for the use of the Middle Fork Reservoir water by explaining that Middle Fork is simply a prudent business investment. Its July 26 letter frankly concedes: "[We consider] the purchase of the water from the Middle Fork reservoir on a take-or-pay basis as desirable and prudent from a business standpoint for the same reason that we had for acquiring coal reserves and for our increasingly large commitments to coal synthetics research. Specifically, it is part of our plan to be in position with the necessary raw materials and technology for entry into coal synthetics whenever entry is, in our opinion, commercially desirable."

[4] July 21, 1977 letter to BLM Wyoming State Director from ARCO's Division Manager. ARCO's letter also speaks of possible use of the water in plants to make synthetic fuels from coal.

A draft environmental impact statement (EIS), pursuant to the National Environmental Policy Act, 42 U.S.C. § 4231 *et seq.* (1976) (NEPA), has been prepared on the right-of-way application, but no final EIS has been prepared. I am informed that a hypothetical coal gasification plant was the only use of this water analyzed therein, although other possible uses come to mind, such as coal liquefaction, coal slurry pipelines, or coal-fired electrical generating plants.

DISCUSSION:

The principal question for decision is whether this information from Carter and ARCO represents sufficient compliance with FLPMA to enable the Secretary to decide whether to grant the right-of-way request.

FLPMA at 43 U.S.C. § 1764(j) (1976) states:

> The Secretary concerned shall grant, issue, or renew a right-of-way under this subchapter *only* when he is satisfied that the applicant has the technical and financial capability to construct the project for which the right-of-way is requested, and *in accord with the requirements of this subchapter.* [Italics added]

One of the important requirements of this subchapter is the duty of the applicant, upon request, to disclose certain information. Sec. 501(b) of FLPMA, 43 U.S.C. § 1761(b)(1) (1976) provides:

> The Secretary concerned shall require, prior to granting, issuing, or renewing a right-of-way, that the applicant submit and disclose those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way, including its effect on competition, which he deems necessary to a determination, in accordance with the provisions of this Act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way.

43 U.S.C. § 1761(b) also addresses itself to disclosure and consideration of the real party in interest.[5] There seems to be little doubt, given their majority interest in the water and their principal financial reponsibility, that Carter and ARCO are real parties in interest.

Under 43 U.S.C. § 1764(d) (1976), the Secretary shall require the applicant:

> prior to granting or issuing a right-of-way pursuant to this subchapter for a new project which may have a significant impact on the environment, * * * to submit a plan of construction, operation, * * * for such right-of-way which shall comply with stipulations or with regulations issued by [the] Secretary, including the terms and conditions required under section 1765 of this title.

Sec. 1765 requires each right-of-way to contain terms and conditions which will, *inter alia*:

> minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; * * * require compliance with applicable air

[5] For example, § 1761(b)(2) directs the Secretary to require the applicant to disclose "the identity of the participants in the entity, when he deems it necessary to a determination, * * * as to whether a right-of-way should be granted, * * *"

and water quality standards established by or pursuant to applicable Federal or State law.

Sec. 1765 also requires inclusion of such terms and conditions as the Secretary deems necessary to:

> protect Federal property and economic interests; * * * protect the other lawful users of the lands adjacent to or traversed by such right-of-way; * * * protect lives and property; * * * protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area of subsistence purposes; * * *

It is clear from all these requirements that the Secretary has an important responsibility in issuing public land rights-of-way. Among other things, his general responsibility, as illuminated by the Senate Committee Report on the bill which became FLPMA, is to determine whether the right-of-way is "in the public interest and * * * meets the requirements of Title [V]." S. Rep. No. 583, 94th Cong., 1st Sess. 66 (1975). Congress specifically instructed the Secretary to require advance submission of a plan of construction and operation for new projects which could significantly affect the environment, (*id.*, § 1764(d)); mandated that terms and conditions adequate to protect the public interest in several specific respects be included (*id.*, § 1765(a)); and vested the Secretary with near-plenary power to require the applicant to make all disclosures and commitments the Secretary deems necessary to his decision whether issuance is in the public interest, (*id.* § 1761(b)(1)). Taken as a whole, Title V fairly bristles with specific procedures which the Secretary must follow and specific responsibilities which he must discharge.

There is no doubt that the Secretary could require the oil companies here to disclose their plans for the use of this water and, failing that, to reject the right-of-way application. Sec. 501(b)(1) authorizes the Secretary to require such information "reasonably related to the use, or intended use, of the right-of-way, * * * which he deems necessary" to make a decision on the application. The use of the water which would inundate the public lands is clearly "reasonably related to" the use of the right-of-way, and can easily be deemed relevant to the decision. It is also clear that the Secretary can adopt this requirement generally in regulations issued under Title V,[6] or impose it on a case-by-case basis.

In a narrow sense, the "use" of this right-of-way across the public lands is only for storage of water, and an adequate EIS would inform the Secretary of the impact of that use on those public lands inundated. The question here is whether the use of that water stored partially on public lands need be disclosed. This is logically and intimately related to the storage of water, because the water stored in this reservoir—where flood control is not a purpose—is principally to be used

[6] FLPMA's § 310, 43 U.S.C. § 1740, gives the Secretary broad authority to issue regulations to carry out the Act.

elsewhere to facilitate industrial, agricultural or other new, unknown development. Indeed, Carter and ARCO's letters concede this point. The matters which remain unanswered are where the water is to be used and how it is to be used.

Sec. 504(d) requires applicants for projects which may have a significant environmental impact to submit in advance of decision a plan which covers, among other things, *operation* of the right-of-way. The initial question is whether "operation" of the right-of-way includes those off-site operations made possible by the storage of water in the reservoir. It would seem obvious that it does, since the reservoir is for the purpose of supplying water for industrial or other facilities or developments which may or may not be adjacent to the right-of-way (the reservoir) itself. The logical chain of storage supply and use is direct.

Support for this conclusion is also found in that part of sec. 501(b)(1), 43 U.S.C. § 1761(b)(1) (1976), which authorizes the Secretary to require the applicant to supply information "*reasonably related to* the use, or intended use" (italics added) of the right-of-way, as opposed to information about the use itself. Here it seems obvious that the use of the water stored on the right-of-way bears a reasonable relation to the use of the right-of-way itself (to store the water). Support is also found in that part of sec. 501(b) which authorizes the Secretary to require information about the right-of-way's effect on "competition," which in this context is determined by the use of this stored water in an arid region where water for agricultural and industrial use is scarce. Sec. 504(a), 43 U.S.C. § 1764(a) (1976), also refers to the "project for which the right-of-way is issued." Although the context in which this language is used refers to the right-of-way ground occupied by project facilities, here we have a right-of-way application whose sole reason for existence is to make possible a project elsewhere. In these circumstances "project" may logically be read to include the total project made possible by the right-of-way.

However, FLPMA's sec. 505(b)(vi), 43 U.S.C. § 1765(b)(vi) (1976), authorizes (but does not require) the Secretary to include such terms and conditions as he deems necessary, *inter alia*, to "protect the public interest in the *lands traversed by the right-of-way or adjacent thereto.*" (Italics added.) From this, it might be argued that the Secretary is not authorized to include conditions regulating uses not on or adjacent to the right-of-way.

The short answer to this is found in sec. 505(a), which describes terms and conditions that *must* be included in the right-of-way (as opposed to 505(b)'s permissive terms and conditions), but which is *not* limited to conditions necessary to

protect the public lands traversed by the right-of-way. These mandatory terms are broadly expressed; *e.g.*, "to minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment," and are not limited to damage to the right-of-way itself. This contrast between 505(a) and 505(b) is telling.

It is clear from another perspective that the Secretary cannot blind himself to the use to which the water would be put. NEPA requires that a decision on a project which has a significant environmental impact must be preceded by an environmental impact statement. The environmental impacts of this water storage project include the use to which the water will be put, which necessarily means these uses must be considered in making a decision on the project. The NEPA cases are legion on this point. *See e.g.*, *Alaska* v. *Andrus*, 580 F. 2d 465 (D.C. Cir., Feb. 24, 1978), partially vacated on other grounds, — U.S. — (1978), where the Court emphasized that one of NEPA's "most important functions" is the "affirmative obligation" it places on agencies to "seek out information concerning the environmental consequences of proposed federal actions."[7] Reading NEPA and FLPMA together, giving full effect to each, necessarily means that the uses of the water must be considered in making a decision on the right-of-way.

The difficult issue posed in this case is whether the Secretary can make an initial decision on the right-of-way without information about the planned use; whether, in other words, the Secretary must deem the intended use—as opposed to possible uses—of the water to be information necessary to his decision whether to grant the application. The previous opinion of the Deputy Solicitor concluded that such information was essential to his decision, and the failure to obtain it prior to decision would be, in effect, a violation of FLPMA.

We must turn first to the statutory language itself. The language of 43 U.S.C. § 1761(b)(1) seems permissive; *i.e.*, the Secretary shall require such information "which he deems necessary to a determination, in accordance with the provisions of this Act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way." It is noteworthy that the necessity of providing information "reasonably related to the use, or intended use" of the right-of-way is tied directly to the Secretarial decision on both the right-of-way *and* the terms and conditions which must be included with it. It is also noteworthy that Congress refers to information "reasonably related to *the* use, or *intended* use," (italics added) rather than to possible or speculative uses. This strongly implies that a specific use must be

[7] 580 F. 2d at 473. The Court went on to point out that some element of speculation is implicit in NEPA, and that one of the functions of an EIS is pointing out unknown environmental effects. *Ibid.*, citing *Jicarilla Apache Tribe* v. *Morton*, 471 F. 2d 1275, 1280 (9th Cir. 1973); and *Sipi* v. *AEC*, 481 F. 2d 1079, 1092 (D.C. Cir. 1973).

within the contemplation of the applicant at the time application is made. The use of the "which he deems necessary" language, however, must have been intended to vest some discretion in the Secretary.

Nothing in the legislative history conclusively resolves the specific question here at issue. Although the House Report's discussion of this section admonishes the Secretary to be cautious in seeking information, it also underlines the connection between the seeking of information and the formulation of permit terms and conditions:

> (b) Submission and disclosure are required by applicants for a right-of-way of any and all plans, contracts, agreements or other information or material which the Secretaries deem necessary for a determination as to whether the right-of-way shall be granted, issued or renewed and the terms and conditions of the right-of-way, if it is granted. One purpose of this is to enable the Secretaries concerned to make decisions and determine terms and conditions which will foster competition among producers and distributors. A condition consistent with this purpose is a requirement on transmission line companies to use their excess capacity for wheeling power from other systems. For the sake of economical operations and avoidance of undue burdens on the government and on applicants, the Committee expects the Secretaries to be cautious in their demands for information. They are expected to seek only the minimum amount of information essential for making the determinations required by law.[8]

In its evaluation of Title V, the Senate Committee recognized that precise plans of operation may be uncertain at the time of application. In commenting on sec. 501(b)(1)—which requires an applicant for a right-of-way "for a new project which may have a significant impact on the environment" to submit a plan of "construction, operation, and rehabilitation" for such right-of-way, 43 U.S.C. § 1761(b)(1) (1976)—the Senate Report states:

> The information required is to be set forth in regulations or stipulations and must include information in certain specified areas. It is not intended that the plans of construction, operation, or rehabilitation be a detailed final plan since all details and conditions cannot be known at the time of application. However, the plan should be a description in as much detail as the state of the planning for the particular project will permit and must be adequate enough for the Secretary or agency head to make an informed judgment on the application and on the need for imposing any special terms and conditions which the public interest may require.[9]

Besides recognizing that final plans may be lacking at the application stage, however, the Senate Report underscores the necessity of making "an informed judgment"—the key criterion for the Secretary to act under Title V.

As noted above, both secs. 1761(b) and 1765 refer specifically to terms and conditions to be included

[8] H. Rep. No. 1163, 94th Cong., 2d Sess., 20 (1976).

[9] S. Rep. No. 583, 94th Cong., 1st Sess., 72 (1975).

with the right-of-way. Sec. 1761 speaks of information necessary for both the determination whether the right-of-way shall be issued *and* the terms and conditions which should be included. Sec. 1765 requires *all* rights-of-way to contain terms and conditions which will, *inter alia*, protect the environment and specifically "minimize damage to scenic and esthetic values and fish and wildlife habitat." These terms and conditions must be formulated in advance of a decision on environmentally important rights-of-way, to give the applicant the opportunity to formulate a proposed plan of construction, operation and rehabilitation complying with them.[10]

The statutory language itself makes readily apparent that Congress has given the Secretary specific and strict instructions concerning terms and conditions (FLPMA § 505, 43 U.S.C. § 1765 (1976)) (italics added):

> Each right-of-way *shall* contain—
>
> (a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards * * * for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards; and
>
> (b) such terms and conditions as the Secretary concerned deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way * * *; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.[11]

These requirements make clear that it may not be possible to include fully complying terms and conditions in a right-of-way where the ultimate use is uncertain. To take one obvious example, it is uncertain how damage to scenic and esthetic values may be "minimized" if the use of the water is now unknown. This reflects Congress' contemplation either that the Secretary cannot issue a right-of-way in the face of uncertain use, or, if he decides to do so, that the right-of-way can be issued only if the Secretary retains the right to approve future or different uses of the water.

The question reduces itself to whether the seemingly permissive language of sec. 1761 concerning information overrides the inference—arising from sec. 1764's mandate to submit a plan of operation, and sec.

[10] As noted above, if the project needing the right-of-way would have a significant effect on the environment, as this one concededly does, then § 504(d) requires submission of a plan of construction and operation of the right-of-way which complies with the proposed terms and conditions to be attached to the right-of-way. *See* pp. 295, 296, *supra*.

[11] *See* Rep. (now Senator) Melcher's comment on Title V in 122 Cong. Rec. H7620 (daily ed. July 22, 1976) (italics added): We think that the whole title [V of FLPMA] expands the * * * responsibility *requiring that he [the Secretary] must make certain stipulations* if he should grant a permit.

1765's mandate to include protective terms and conditions—that basic information concerning specific planned uses is necessary before the application can be entertained by the Secretary.

Certainly there are powerful reasons for rejecting this application unless the use of the water is known and disclosed. Carter and ARCO in essence seek to speculate with the water which will be stored partially on public lands. No use being yet fixed, the water will probably eventually be sold to the highest bidder or developed for its most profitable use at some point in the future. Indeed, there is nothing which would prevent Carter and ARCO from turning the water back to agricultural use, or using it for a completely different use. The Secretary could easily question whether it is in the public interest to grant the right-of-way now and permit this speculation.

Speculation in public resources has always been disfavored. Congress long ago erected a policy against speculation in the public lands. Any person applying to enter public land under the Homestead Act was required to file an affidavit swearing that he or she did not apply for the land "for the purpose of speculation." [12]

To take another example, one of the purposes of the excess land limitation in reclamation law is to limit private speculative gains resulting from reclamation projects. See *United States* v. *Tulare Lake Canal Co.*, 535 F. 2d 1093, 1119 (9th Cir. 1976); *cert. den.* 97 S. Ct. 1156 (1977). FLPMA itself stands in part for the end of an era of speculation in public resources. See, *e.g.*, S. Rep. at 27–36; the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411–1418, Pub. L. 88–606, 78 Stat. 982 (1964); *One Third of the Nation's Land*, Final Report of the Public Land Law Review Commission (PLLRC), Ch. 18 (1970); *Reed* v. *Morton*, 480 F. 2d 634 (9th Cir. 1973).[13]

And certainly the experience with the federal coal leasing program in the past two decades has not been a happy one, with nearly eighteen billion tons under lease and very little developed. Congress' dissatisfaction with that situation is well-

[12] § 2290 of Revised Statutes, *as amended* by Act of Mar. 3, 1891, 26 Stat. 1099 (repealed by FLPMA). *See also Bailey v. Sanders*, 228 U.S. 603 (1913); *Union Naval Stores v. United States*, 240 U.S. 284 (1916); *United States* v. *Morehead*, 243 U.S. 607, 612 (1917); *Great Northern Ry. Co. v. Reed*, 270 U.S. 539 (1926).

[13] The PLLRC took some pains to guard against undue speculation in public lands and resources. Addressing disposals of public lands, the Commission noted that reasonable restrictions are sometimes appropriate "to prevent speculation or diversion of land uses detrimental to the public interest, while permitting local communities and states an opportunity to exercise continuing control over use changes by the adoption of suitable planning and zoning measures." While we are not here dealing with disposal of public lands, the practical effect of reservoir construction here is to fix the use of these public lands for a long time to come. It should also be noted that FLPMA in part reflected the PLLRC's recommendations. The Senate Report on FLPMA noted that the Act was consistent with more than 100 of the PLLRC's 135 recommendations. *See* S. Rep. No. 94–583 (94th Cong., 1st Sess.), at 35 (1975).

known. The Federal Coal Leasing Amendments Act of 1976, passed two months prior to FLPMA over Presidential veto, 30 U.S.C. §§ 201 *et seq.* (1976), Pub. L. No. 94–377, stands foursquare for the notion that private speculation in publicly-owned coal resources, without diligent development, is not sound public policy.

One result of allowing the speculation here is to open the possibility that—even though the uses considered possible today have been discussed in the EIS and can be taken into account in making a decision—new, unforeseen uses for the water could surface in the future. These new uses could involve impacts which the Secretary would deem unacceptable and therefore not in the public interest to promote by use of federal lands.

Another possibility is that, by the time the water is to be used, some of the potential uses now regarded as reasonable could become unacceptable as a matter of policy. For example, one currently recognized potential use of the water is for mine-mouth generation. At some point, however, the Federal Government could declare mine-mouth generation in this region unacceptable.[14] It is likewise possible to envisage mining of coal for surface gasification as becoming unacceptable, if *in situ* gasification becomes feasible. Experience teaches that the future is not easy to predict, even a few years ahead.

It would, then, be entirely reasonable for the Secretary to conclude that information about the specific use of the water is necessary to a decision whether the right-of-way should be granted. But does this strong public policy against speculation, the mandatory requirement in sec. 1765 for inclusion of terms and conditions adequate to protect the public interest, and Congress' reference to "the use, or intended use," override the seemingly permissive statutory language ("which he deems necessary") of sec. 1761? This is a difficult judgment given the lack of specific congressional direction.

General rules of statutory construction, however, provide sufficient guidance. Where there is in the same statute a specific provision and a general one which in its most comprehensive sense would include matters embraced in the specific provision, the specific provision must control. The general provision must be taken to affect only such cases within its general language which are not within the provisions of the particular provision.

[14] *Cf.* the so-called Metzenbaum amendment to the Clean Air Act of 1977, § 125, Pub. L. No. 95–95, Aug. 7, 1977, 91 Stat. 685, 42 U.S.C. § 7401, *et seq.*, which requires local coal sources to satisfy local coal needs in some circumstances. Specifically, the section authorized a state, the President, or the EPA Administrator to require any major stationary source of pollution not in compliance with an implementation plan or subject to a coal conversion order to enter into long-term contracts for local or regional coal where severe economic disruption or unemployment would result from use of fuels other than local or regional coal.

Sec. 125 of the Clean Air Act of 1977 was amended by the National Energy Conservation Policy Act of 1978, Pub. L. No. 95–619 92 Stat. 3206, Nov. 8, 1978. Sec. 661 of Pub. L. No. 95–619 removed the authority of the Governor of a state to require use of local or regional coal, placing total authority for such action in the Federal Government.

United States v. Cihal, 336 F. Supp. 261 (W.D.C. Pa. 1972), *aff'd.* 497 F. 2d 922 (5th Cir. 1974); see also *Ritter v. Dagel*, 156 NW. 2d 318 (S.C. Iowa 1968); *Brady v. Detroit*, 91 NW. 2d 257 (S.C. Mich. 1958); *Western Realty Co. v. Reno*, 172 P. 2d 158 (S.C. Nev. 1946). Furthermore, the Supreme Court has specifically held that the meaning of specific statutory provisions may not be changed by superimposing upon them inferences from general statutory provisions, even if found in the same statute. *National Labor Relations Bd. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). See also *Adamowski v. Bard*, 193 F. 2d 578 (1952).

On balance, I conclude that the general language of sec. 1761 is overridden by sec. 1764's specific mandate to submit a plan of operation, sec. 1765's specific mandate to include protective terms and conditions, and Congress' reference to "the use, or intended use" of the right-of-way. I hold, therefore, that the Secretary may not consider this application without further information being supplied.[15]

In reaching this result, I have considered factors, other than those already discussed, which support this result. First, not only is the apparently permissive language of sec. 501(b) directly tied to the decision whether to grant the right-of-way, and if so, what terms and conditions should be included, but the Secretary is required to obtain fair market value for the right-of-way. *See* 43 U.S.C. §§ 1701(a)(9); 1764(g). This is difficult if not impossible to calculate when the use of the water is unknown.

Second, if this permit application were granted, but the Secretary conditioned the right-of-way on subsequent approval of use and retained a continuing power of approval of the water use once the right-of-way is granted, the permittee might well argue, at some point in the future, that the United States is barred from enforcing that condition and exercising that reservation; *i.e.*, that once the Secretary grants the application, he is barred from controlling or determining new or additional uses. Although I am unpersuaded by that argument, the simpler course is to avoid the possibility altogether by requiring the applicant to disclose now the intended use of the water, and to petition the Secretary for permission to change the use if, in the future, the applicant so desires.

Third, in any event, postponing the decision on how the water can

[15] It is important to remember that the context in which this issue is posed is where the use of a large percentage of the water stored (71%–89%) is not known. The Secretary's legal duty is modified as the percentage declines; for example, there would be less reason for pause if the use of only a small percentage of the water were unknown. This in itself suggests that approaching this problem by regulations—which can anticipate and control a range of possibilities far easier and more predictably than case-by-case decision—is much desired. *See* text accompanying footnote 6, above.

be used until after the reservoir is completed makes it practically more difficult for a Secretary to reject uses which may offend public policy at the time they are proposed. The expenditure of money to complete the structure may, intended or not, shift the equities somewhat and preclude a totally objective evaluation of the propriety of uses proposed after completion.

Fourth, this interpretation is consistent with national water policy. The Final Report of the National Water Commission [16] stresses that "[c]ertain regions of the Nation either already are or potentially could in the future be using water beyond their natural water resources. Steadily increasing municipal and industrial water requirements in these areas, and potentially others, * * * could place severe strains upon limited water resources." Our denial of this application will address this problem by preventing the tying up of water for speculative purposes and thereby leaving the water free for current uses as they develop. The Administration's water policy message [17] combines emphasis on economic feasibility with conservation and environmental protection. Refusing to license a premature application will enable federal, state and local planners to make sound, informed judgments as to the economic feasibility of a project and will reduce the possibility of the project's being subject to a series of delays or forced abandonment because of adverse environmental considerations that may develop. The NWCR emphasized the importance of pre-planning for informed decisionmaking and the need for information on application for permits.[18] It suggested that permits should contain, among other things, the full source of water supply, the point of diversion, and the place, nature and time of use. And, at page 528, the NWCR concludes as to reservoirs (as herein), canals, and powerplants

> when or whether new facilities can be built will depend on understanding more completely *their effects when in operation* and the consequences of not having them available when needed * * * [T]he ultimate use of basic data is to provide a sound base for decisionmaking * * * (italics added)

Our position is fully consistent with these suggestions.

Fifth, the result I reach is also consistent with a recent case holding that an EIS on a proposed federal oil and gas lease sale need not consider state and local laws which might affect various possible methods of transporting oil from the lease area to the shore. See *County of Suffolk* v. *Secretary of the Interior*, 562 F. 2d 1368, 1378–82 (2d Cir. 1977), *cert. den.*, 434 U.S. 1064 (1978). The court there held that exploration of offshore mineral resources is particularly susceptible to accomplishment in discrete stages, and with additional knowledge obtained at each successive stage, a

[16] *Water Policies For the Future*, 8, 9 (June 1973) (hereinafter referred to as NWCR).

[17] June 6, 1978.

[18] NWCR at 205–225, 280–94, 365–94.

further EIS could be prepared. The *County of Suffolk* court found that the development of OCS oil and gas resources has been accorded a high priority by Congress where it can be done consistent with protection of the environment. The Nation's years of experience with OCS development suggest that it can be properly controlled and safeguarded, making the Court of Appeals' judgment a reasonable one. Here, by contrast, the use of this water is totally unknown. Some possible uses which have been suggested have never been commercially successful in the United States, and are fraught with environmental and other uncertainties. Moreover, the water here could be used for some totally unknown purpose far beyond present comprehension or contemplation. In such circumstances, the rule of *County of Suffolk* cannot control.

Sixth, the result I reach here is consistent with the Supreme Court decision in *Udall* v. *FPC*, 387 U.S. 428 (1967). This pre-NEPA decision stands foursquare for the notion that possible impacts must be considered prior to decision, despite statutory language which seemed to give the Commission discretion to make a judgment without specifying the factors to be considered. Specifically, the Supreme Court overturned an agency decision and remanded the case back to the FPC to make an informed decision despite the discretionary language of section 7(b) of the Federal Water Power Act.

> The primary question in the cases involves an interpretation of § 7(b) of the Federal Water Power Act of 1920, as amended by the Federal Power Act, 49 Stat. 842, 16 U.S.C. § 800(b), which provides:
>
> "Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.[19]

A license under the Act empowers the licensee to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, in effect, to appropriate water resources from the public domain. The Supreme Court held that: "The determinative test is whether the project will be in the public interest, and that determination can be made only after an exploration of all relevant issues." [20] The Court further stated:

> The question whether the proponents of a project "will be able to use" the power supplied is relevant to the issue of the public interest. So too is the regional need for the additional power. But the inquiry should not stop there. * * * [Relevant issues also include] future power demand and supply, alternate sources of

[19] 387 U.S. at 431.
[20] 387 U.S. at 429.

> power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish and commercial and recreational purposes, and the protection of wildlife.
>
> * * * * *
>
> [T]he Commission will not have discharged its functions under the Act unless it makes an informed judgment on these phases of the cases.[21]

This case strongly supports the result that the Secretary of the Interior must have some information from the oil companies as to their use or intended use of the Powder River Reservoir water. Without this information, the Secretary cannot make an informed decision, and he does not have the discretion to grant the right-of-way application.

CONCLUSION:

I must emphasize once again that my decision here must be understood in the context of the facts with which I am presented. The bulk of the water here in question is for an admittedly unknown use. Such water is, moreover, to be stored in an arid region with scarce water supplies and vast potential and developing energy resources, including coal, uranium and oil and gas. The real parties in interest are energy companies frankly conceding their desire to use this water eventually for energy conversion, probably involving exotic conversion techniques not yet demonstrated to be economically feasible and whose impacts are not known. But these companies also cannot now do more than speculate about how the water will in fact be used.

I am not, in other words, presented with a situation where there are but a few uncertainties of the type which normally characterize rights-of-way applications. Nor, in this case, do those uncertainties embrace possible choices among conventional alternatives with known consequences. In such circumstances, caution is dictated.

As a final caution, I must point out that these facts present what is perhaps the clearest possible case of uncertainty. I am not holding that FLPMA requires that all end uses must (or can be) pinpointed in a right-of-way application; for example, I do not believe that, in the ordinary case, an applicant for a right-of-way to build an electric transmission line across public lands must disclose all the end uses for the electricity transmitted over the facilities to be constructed. A rule of reason must apply here, and my holding is simply that, given the specific facts presented by this application, the conceded unknowns prevent the Secretary from making an "informed decision" on the application, and therefore he may not proceed to consider it.

LEO KRULITZ,
Solicitor.

RECLAMATION LAW—CONTROL OF THE SALE PRICE OF FORMERLY EXCESS LANDS*

Bureau of Reclamation: Excess Lands

Sec. 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e (1976), re-

[21] 387 U.S. at 450–1.

*Not in Chronological Order.

quires the Secretary of the Interior to control and approve the purchase price of both initial sales of excess land, and resales of this formerly excess land until one-half the construction charges allocated to such land has been paid, in order for the land to continue to be eligible for project water.

In approving the sale price of formerly excess land until one-half the construction charges allocated to such land has been paid, the Secretary of the Interior is required to use the same standard used for approving the sale price of the initial sale of excess land; that is, the sale price must be fixed by the Secretary on the basis of the actual bona fide value of the land on the date of appraisal without reference to the value added by the project. The price approval requirement will not apply to formerly excess lands which were acquired, with Secretarial approval, from excess into non-excess status prior to May 18, 1979, the date of this opinion.

Statutory Construction: Administrative Construction

In determining whether interpretation of a statute should be given prospective effect, some of the factors to be considered are whether the statute is easily susceptible to more than one interpretation; whether the interpretation being overruled has been followed since enactment of the statute; the nature of the reliance placed on the precedent by the parties; the purpose of the statute or rule in light of public policy; the harm to the parties who have relied on the precedent to their detriment; and the harm either to the government or the public purpose.

Regional Counsel Memorandum (Anti-speculation provisions in Sec. 46 of Adjustment Act), Aug. 23, 1949, overruled; Regional Counsel Memorandum (Excess Lands—Central Valley Project—Sales of Excess Lands), June 8, 1951, overruled.

M-36913

May 18, 1979

OPINION BY

OFFICE OF THE SOLICITOR

MEMORANDUM

To: SECRETARY

FROM: SOLICITOR

SUBJECT: RECLAMATION LAW—CONTROL OF THE SALE PRICE OF FORMERLY EXCESS LANDS

I. INTRODUCTION

In response to a court order in *National Land for People v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976), the Department issued proposed rules and regulations respecting sales of excess land. 42 FR 43044 (Aug. 25, 1977). These proposed rules contained a provision authorizing the Secretary to control the sale price of resales of formerly excess land. This provision interpreted applicable law to prohibit the speculation and collection of windfall profits on so-called "turn-around" sales of excess lands.[1]

The purpose of this opinion is to set out the legal basis for that interpretation, and provide guidance to the Bureau as to how the sale

[1] I first set forth and explained the reasons for this interpretation in testimony, discussed at p. 314 below, to the House Interior Subcommittee on Water and Power in July 1977. The Department has consistently taken that position since, and has included an express provision to that effect in recent reclamation contracts. *See* p. 317 below.

price may be controlled. To summarize what follows, I hold that sec. 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e (1976), requires the Secretary to control and approve the purchase price of both initial sales of excess land, and resales of this formerly excess land until one-half of the construction charges allocated to such land has been paid.

Because the Department's past practice has not been consistent, however, there is a question whether this opinion should be given retroactive or prospective effect. As explained below, considering the applicable standards for determining when an opinion should be given prospective effect, this opinion should be applied only to resales of excess land which is transferred, with Secretarial approval, into nonexcess status after the date of this opinion, until one-half the construction charges have been paid, regardless of how many times that formerly excess land is resold. The prospective application of this opinion is to prevent inequities that could result from disrupting accounting, lending and other financial and legal practices concerning formerly excess lands. Since this Department had taken, in at least one region of the Bureau of Reclamation, the position that sale prices of formerly excess land need not be controlled, landowners of formerly excess land valued those lands on balance sheets at current market value. Also, lending institutions made loans based on the market value of those formerly excess lands. This approach should fully protect those landowners and financial institutions who have valued formerly excess lands at a price higher than the controlled sale price. At the same time, this approach will, consistent with the standards for determining whether an opinion should be given retroactive or prospective effect, limit the speculative benefits and windfall profits which would otherwise be obtained.

II. BACKGROUND

1. The Reclamation Act of 1902, the Reclamation Program and Its Purposes

The purposes of the reclamation law have been summarized by the federal courts as follows:[2]

> The project was designed to benefit people, not land. It is a reasonable classification to limit the amount of project water available to each individual in order that benefits may be distributed in accordance with the greatest good to the greatest number of individuals. The limitation insures that this enormous expenditure will not go in disproportionate share to a few individuals with large land holdings. Moreover, it prevents the use of the federal reclamation service for speculative purposes.[3]

It is a basic goal of the reclamation laws to create family-sized farms in areas irri-

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[2] Useful summaries of the background of the Reclamation Act of 1902 can be found in *Solicitor's opinion, 68 I.D. 372, 374* (1961); Taylor, "The Excess Land Law: Execution of Public Policy," 64 Yale L.J. 477, 481–87 (1955); and Sax, "Federal Reclamation Law," II *Waters and Water Rights* (1967, Clark Ed.) §§ 110, 110.1, pp. 113–21; § 120.1, pp. 210–14.

[3] *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 297 (1958). *See also United Family Farmers* v. *Kleppe*, 552 F. 2d 823, 826 (8th Cir. 1977). The Court in *Ivanhoe* also pointed out that the Federal Government can impose

gated by federal projects. It is also a basic goal of the reclamation laws to secure the wide distribution of the substantial subsidy involved in reclamation projects and limit private speculative gains resulting from the existence of such projects.[4]

As these quotations reflect, the control of speculation in the benefits of reclamation projects was a central goal of Congress from the very beginning.[5]

To further these purposes, and in particular to avoid the monopolization and land speculation which had plagued prior federal disposal of the public domain, Congress included in sec. 5 of the Reclamation Act the acreage limitation: "No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner." 43 U.S.C. § 431 (1976). Subsequent legislation was enacted to correct defects which surfaced in implementing the original legislation, to better carry out those original policies. See, *e.g.*, 43 U.S.C. § 544 (Act of Aug. 9, 1912); 43 U.S.C. § 471 *et seq.* (Act of Aug. 13, 1914); 43 U.S.C. § 511 (Act of May 15, 1922); 43 Stat. 701–04 (Act of Dec. 5, 1924); 43 U.S.C. § 423 (Act of May 25, 1926).

2. Sec. 46 of the 1926 Act.

We are here concerned with the last of these major efforts to "fine-tune" the excess land law, sec. 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e (1976). It requires, among other things, that contracts between the United States and irrigation districts provide that:

> [*A*]*ll irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres* shall be appraised * * * and *the sale prices thereof fixed* by the Secretary on the basis of its actual bona fide value * * * *without reference to the proposed construction of the irrigation works*, and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that *until one-half of the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary.* [Italics added.]

It would serve no useful purpose here to delve deeply into the background of events leading up to the 1926 Act. That history has been fully and authoritatively discussed elsewhere.[6] Suffice it to say that sec. 46 was designed to cure specific shortcomings which had surfaced in

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reseasonable conditions on the use of federal funds and property, relevant to the federal interests in the reclamation program and its overall objectives, 357 U.S. at 295, and that it is entirely proper for the Federal Government to "regulate that which it subsidizes." 357 U.S. at 296, quoting *Wickard v. Filburn*, 317 U.S. 111, 131 (1942).

[4] *United States* v. *Tulare Lake Canal Co.*, 535 F. 2d 1093, 1119 (9th Cir. 1976), *cert. den.* 429 U.S. 1121 (1977); *reh. den.* 430 U.S. 976 (1977).

[5] See also H.R. Rep. No. 1468 (57th Cong. 1st Sess.) (1902), pp. 5–8; H.R. Rep. No. 505 (63d Cong., 2d Sess.) (1914).

[6] *See, e.g., United States v. Tulare Lake Canal Co., supra.* 535 F. 2d at 1131–35.

carrying out the excess land law—to further, not denigrate or modify, the policies of that law. As one of my predecessors has observed:

> As the excess land provisions have evolved from 1902 to the present, the purpose of Congress has been consistent. The changes that have been made have been in the means to accomplish the end, never to change its fundamental purpose. As the law has evolved the Congress has sought not to weaken but to strengthen; not to open loopholes but to close them; not to encourage speculation but to stop it.[7]

Sec. 46 must be interpreted from that perspective.

III. THE ISSUE—CONTROL OF THE SALE PRICE OF LAND IN RECLAMATION PROJECTS

The question is the extent to which the underlined provision quoted above requires the Secretary to control the sale price of lands benefiting from reclamation project water until one-half the construction charges against those lands have been repaid.

The literal language of sec. 46 can be interpreted in one of two ways:[8]

(a) The provision refers only to the initial sale of excess land,[9] and does not apply to *any* non-excess land, whether formerly excess or not. That is, the phrase "such lands" refers only to excess lands and not to those same lands once they have been sold.

(b) The provision refers to the initial sale of excess land, and any subsequent sales involving that land, but does not refer to the sale of any land which was non-excess at the time the project came into being and remains so thereafter. That is, "such lands" refers to lands required by the earlier part of sec. 46 to be sold as excess, both before and after they are sold into non-excess status.

The issue is not without practical importance. Although values vary according to soils, climate, and other factors, lands which are blessed with a supply of federal reclamation water typically have a value easily two or three times what it would be without such water.[10]

Expressing the two interpretations above in hypothetical terms (based on real examples), can the purchaser of excess land, who holds this land as non-excess for an investment of, say, $500 per acre, turn around and sell it to another for, say, $1,500 per acre? The first interpretation would require such a result. Under the second interpretation, the Secretary must, until one-half the construction charges are paid, regulate that second, "turn-around" sale of formerly excess

[7] 68 I.D. 372 at 377 (1961); *see also Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 297 (1958); *United States* v. *Tulare Lake Canal Co., supra*, 535 F.2d at 1131–32, 1134, 1135.

[8] Professor Joseph Sax, a noted authority on reclamation law, argues for a third interpretation; namely, that the provision refers to the sale of *all* land in the project, whether excess, formerly excess, or continuously non-excess. *See Sax*, "Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy," 64 Mich. L. Rev. 13 (1965).

[9] Under § 46, excess land must be sold "on the basis of its actual *bona fide* value * * * without reference to the proposed construction of the irrigation works. (Italics added.)

[10] Professor Sax cites one example in Oregon where land values increased by as much as five times where federal water became available in 1961. In the first decade after the reclamation program began, the average price of land benefiting from the program increased exceeded 750%. Sax, *op. cit.* note 8, *supra*, at 14, 17.

lands to ensure that benefits attributable to the project are not obtained.[11]

This question has received careful attention from two sources: (a) a search analysis of this precise problem by Professor Sax, *op. cit.*, note 8, *supra*, and (b) the opinion of the United States Court of Appeals for the Ninth Circuit in *United States* v. *Tulare Lake Canal Co.*, 535 F. 2d 1093, 1135 (9th Cir. 1976), *cert. denied* 429 U.S. 1121 (1977), *reh. den.* 430 U.S. 976 (1977).

Professor Sax's article explains the source of the problem (pp. 15–16), the early history of reclamation legislation (pp. 16–18), the history of Congress' attempts to curb speculation and windfall profits in the sale of excess land (pp. 18–22), and the legislative history of sec. 46 of the Omnibus Adjustment Act with which we are centrally concerned (pp. 22–27). He also discusses Congressional action after 1926 (pp. 29–30), issues of policy (pp. 31–40) and practical administration (pp. 40–44), and whether state laws and existing contracts present any barriers to the interpretation he supports (pp. 44–45). He points out that the Department initially began to implement the 1926 law by controlling the sale price of all project lands (pp. 26–27), and concludes that the Department's previous failure to control the sale price of project lands has allowed "the wrong people [to enrich] themselves at the expense of their fellow citizens." Sax, 64 Mich. L. Rev. at 46.[12]

Eleven years after Professor Sax's article, the first federal court to ever reach this issue addressed the problem. *United States* v. *Tulare Lake Canal Co.*, *supra*. The Court unanimously concluded that the pertinent part of sec. 46 was included to meet the problem of speculation and windfall profits in the sale of formerly excess lands, "by enabling the Secretary to control the price at which some resales were made." 535 F. 2d at 1135. In a footnote to that remark (*ibid.*, note 172), the Court pointed out:

> By imposing restrictions on subsequent sales of excess land only until one half

[11] The second interpretation would not, however, require the Secretary to regulate the sale of non-excess land which had not previously been excess. Under Professor Sax's (third) interpretation, see *note* 8, *supra*, the Secretary would be required to regulate the sale price of all lands benefiting from reclamation project water to prevent speculative profits, if those lands are to continue to receive reclamation project benefits.

[12] As noted above, Professor Sax argues in this article for the broadest possible result—the anti-speculation price control provision should apply to all lands in the project, and not just formerly excess land. His basic arguments are: The sale price control provision was originally in sec. 46 before language was added dealing specifically with excess land, and it was only "fortuity" that the provision for sale of excess lands was inserted ahead of it. While he concedes that grammatically this insertion supports the idea that Congress thus intended to limit the coverage of the sale price control provision to formerly excess land, he finds nothing in the legislative history or Congress' general objective to suggest this is the case. (*Id.*, at 24–25.) He also suggests that it makes little sense to restrict the control merely to formerly excess land. This would allow a person who owned 160 acres in the area before the project was built to sell that land at any time after the project was built and reap the additional value provided by the federal project at any time without interference. Yet a person who bought 160 acres from an excess landowner could not do the same thing. (*Id.*, at 32–38.)

of the construction charges have been repaid, Congress reached an accommodation between competing policies of eliminating the middleman and allowing the purchasing settler to alienate his land freely and realize some of its enhanced value, which might be attributable in part to the settler's efforts in reclaiming the land and preparing it for cultivation.[13]

It might be argued that this conclusion is *dictum*. The central issue in this part of the case was whether Congress had allowed those landowners who had paid off the construction charges allocated to their lands to escape the excess land law—the so-called "payout" argument. The proponents of payout argued that, because price control ends under sec. 46 when one-half of the construction charges had been paid, sec. 46 therefore acknowledged and ratified the concept of payout itself. The Court of Appeals held that this was a "patent misconstruction" of the "meaning and purpose of" the relevant clause in sec. 46; viz., that its "purpose and effect was to strengthen the Secretary's hand in dealing with speculative sales, not to weaken it." 535 F. 2d at 1134. The Court pointed out: "When the clause in question is confined to sales subsequent to the initial sale of excess land, as intended, it does not embody a partial 'payout' principle as appellees argue." *Ibid.* Whether one considers this *dictum* or a holding, it is plain that the Court of Appeals carefully considered the matter and left no doubt at all about its view that sec. 46 applied to the sale of formerly excess land.

[13] *Tulare Lake, supra,* note 172. Although the Court cited Professor Sax's analysis, it did not suggest that this anti-speculation control applied to other lands benefiting from a project besides formerly excess land.

IV. PAST DEPARTMENTAL PRACTICE

The Department's past practice in implementing sec. 46 has not been uniform. Professor Sax discusses provisions inserted in several dozen Bureau of Reclamation contracts which provided for control over the sale price of all lands in a reclamation project which did not have preexisting water rights. See Sax, *supra*, 64 Mich. L. Rev. at 27–28, notes 51–52. See also H. Rep. No. 448, 81st Cong., 1st Sess. 18 (1949).

A 1946 Bureau of Reclamation study of the acreage limitation, citing these same contract provisions, concluded that the Secretary had authority to control speculation in the sale of non-excess lands.[14] This report pointed out that previous to 1926, Congressional efforts to control speculation had

> failed because no provision was made for control of such price at sales subsequent to the first disposal of excess land. Section 46 meets this problem by providing that until one-half of the construction charges against such excess land are paid, sale of the land does not carry the right to receive water until the purchase price is approved by the Secretary.[15]

The Report also pointed out:

> Control of speculation on non-excess lands has also been attempted on a number of projects since 1926.[16]

[14] *Report on Land Ownership Survey on Federal Reclamation Projects With Legal, Historical and Economic Background,* U.S. Department of the Interior (July 1946), Part II, pp. 30–34.

[15] *Id.*, p. 46.

[16] *Id.*, p. 48.

And further:

> Control of speculation upon non-excess lands has been imposed by statute on several projects covered by the provisions of the Department of the Interior Appropriation Act of 1926 (43 Stat. 1166–1170), on the Tucumcari Project by amendment of the authorization, April 9, 1938 (52 Stat. 211), and in the Columbia Basin Project Act of 1943 (57 Stat. 14). Authority of the Secretary of the Interior to control speculation upon non-excess lands on other projects stems from his power to make rules and regulations necessary to assure repayment. (Sec. 10, Reclamation Act of June 17, 1902, 32 Stat. 390). In two cases decided by the Circuit Court of Malheur County, Oregon, such provisions were sustained on this basis. (Unreported. *Terry* v. *Pinney and Owyhee Irr. Dist.*, and *Pfeiler* v. *Greig and Owyhee Irr. Dist.*, Jan. 27, 1937).[17]

We have found two mentions in Departmental records of the interpretation that sec. 46 provides for no control of the sale price of formerly excess non-excess lands. The first is in a short teletyped message dated Aug. 23, 1949, to the Washington Office of the Bureau of Reclamation from the Bureau's Regional Counsel in California, which states as follows:

> It is our opinion that bona fide purchaser of excess land who holds such land as owner of non-excess land has right of resale free of sale price limitations contained in section 46 of the Omnibus Adjustment Act of May 24, 1926.

The message went on to concede that "the legislative intent of sec. 46 is not so clear that plausible argument could not be advanced for other conclusions."

A similar opinion was expressed two years later by the California Regional Counsel of the Bureau, in a memorandum to the Bureau's District Manager in Fresno. It also contained no legal analysis.

Neither message referred to the previous practice of controlling such sales or attempted to distinguish prior practice or explain why the interpretation it was based on was wrong.

Because neither document contains any persuasive legal reasoning or support for its interpretation, and the evidence for the other interpretation is so overwhelming, I overrule these expressions. As Professor Sax notes: "The Department has in the past taken a broad view of its authority to deal with [turnaround sales]; it is time to exercise that broad authority again." 65 Mich. L. Rev. at 45.

V. OTHER RECENT DEVELOPMENTS

Two other recent developments warrant some attention. First, in 1977 the House Committee on Interior and Insular Affairs considered a bill (H.R. 3420) which would have expressly provided for control of the sale price of turnaround

[17] *Id.*, p. 48. It should be noted that the Bureau did not subscribe to the view adopted by Professor Sax that sec. 46 requires the control of the sale price of all lands. Rather, the Report found such authority in the Secretary's broad power to "perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." *See* 32 Stat. 390, 43 U.S.C. § 373 (1976); *see also* 38 Stat. 690; Op. Atty. Gen. (Apr. 27, 1905); Sol. Op. M–33902 (May 31, 1945); Assoc. Sol. Op. M–34999 (Oct. 22, 1947).

sales of formerly excess lands, but not other non-excess lands. Testifying on behalf of the Department, I expressed support for the purpose of H.R. 3420, but pointed out that in our opinion the legislation was unnecessary because existing law provided for such control.[18]

The House Committee reported a bill, but it died without further action being taken on it.[19] The House Report observes that sec. 46 appears designed to prevent speculation at least in the sale of formerly excess land:

> Indeed, since section 46 was drafted to remedy the land speculation which took place under the Reclamation Extension Act of 1914, and since that consisted primarily of middlemen reaping unearned profits on resales of formerly excess land, this interpretation appears to be correct.[20]

The House Report also noted the ample opportunity for land speculation, and the evidence that such speculation had been taking place:

> This opportunity [for land speculation and the collection of windfall profits] has not been overlooked by land speculators. The record abounds with examples of speculators who have descended upon areas served by Bureau of Reclamation irrigation projects and reaped tremendous profits on these so-called turnaround sales of formerly excess land. One of the most graphic examples of the profits to be made from this speculation surfaced in a recent criminal fraud case brought by the United States against a land developer for his handling of excess lands located in the Westlands Water District, San Luis Unit, California. Evidence in that case indicated that 1,758 acres of excess land were purchased for $900,000 and were sold eleven days later at a profit of $229,365.[21]

The House Report concluded:

> As long as land developers are able to purchase excess land at a price set by the Secretary of the Interior and resell this land at the prevailing market price, land speculation will continue. Of course, this will hinder the development of the family sized farm as a desirable form of rural life.[22]

The second recent development was in the report of the so-called San Luis Task Force.[23] This Task Force was created pursuant to Public Law 95–46 (June 15, 1977), to investigate and report on the management, organization and opera-

[18] I stated: "[W]e believe Congress has already given us all the authority we need to develop a sound workable program that, among other things, minimizes the opportunity for speculation."

[19] In my view, there is no significance to the fact that this bill was not enacted. Shortly after the hearings, the Department proposed regulations providing for the control of the sale price of formerly excess land. Because I testified, and the House Report concluded, that the correct interpretation of sec. 46 requires such control, the bill was unnecessary.

[20] H. Rep. No. 95–909 (1978), p. 5. Although the Report cites Professor Sax for this result, it does not discuss his broader interpretation.

[21] *Id.*, p. 6. My testimony also identified specific examples of turnaround sales, involving the Westlands Water District in California, where a buyer paid from $450–$700 per acre for land purchased from excess status, and sold it within a fairly short period of time without any price control. The price for non-excess land in the Westlands District during this period ranged from $900–$1,700 per acre, obviously allowing realization of a substantial profit.

[22] *Ibid.* The Report also states, erroneously, that the Department had consistently interpreted sec. 46 since its enactment not to allow the control of sale price of even formerly excess land. *Id.*, p. 5. Both Professor Sax and the 1946 Bureau Study document several examples where the Department had exercised control of the sale price of all lands in a project, including formerly excess land. *See* Part IV, *supra*.

[23] *Special Task Force Report on San Luis Unit, Central Valley Project, Calif.* (1978).

tions of the San Luis Unit to determine the extent to which they conform to the purposes and intent of reclamation law. Part of the Task Force's responsibility was to report on

> **the record of enforcement of the requirements concerning the disposition of excess lands by persons receiving Federal water or major project benefits, * * * and an evaluation of the success of the project in fostering family farms, including the adequacy of present legislation and departmental rules and regulations pertaining to these provisions.**

The Task Force concluded that sec. 46 of the 1926 Act should be read to provide for control of the sale price of formerly excess lands, since it found that this interpretation "best meets the statutory goal of preventing speculation." [24]

In sum, the fact that sec. 46 of the 1926 Act should be interpreted to require controlling the sale price of formerly excess land is not in substantial doubt. The only justification found in Departmental records for the idea that sec. 46 does not require control of the sale price of formerly excess lands was stated in conclusionary terms, without legal analysis, and with an acknowledgement that there were substantial arguments for the contrary interpretation.[25] No reported decisions have reached such a conclusion; in fact, in the only case reaching this issue, the Circuit Court of Appeals rejected it.[26]

There is no doubt that Congress viewed sec. 46 as a remedial measure, to improve administration of the reclamation program, and in particular to better achieve the overriding goal of the reclamation program of providing family farm opportunities for settlers, without opportunity for speculative profits. Considering these circumstances, I believe that the law should be interpreted in conformity with its statutory purpose, that the Department's apparent failure for the last 30 years [27] to further that purpose was wrong, and that the Secretary is obliged to control the sale price of formerly excess lands.[28]

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[24] *Id.*, p. 202. It did not directly address the broader interpretation urged by Professor Sax.

[25] In this respect, the situation is similar to the so-called "Wilbur letter" purporting to exempt the Imperial Irrigation District from the excess land law. *See United States* v. *Imperial Irrigation Dist.*, 559 F. 2d 509 (9th Cir. 1977); *rehearing en banc denied* (Apr. 26, 1979); *see also* Solicitor's Opinion 71 I.D. 496 (1964). The Ninth Circuit noted that the "Wilbur letter" was an "informal" opinion reached under circumstances indicating a "lack of careful consideration" and thus "not entitled to deference" as an administrative interpretation of law. 559 F. 2d at 539.

[26] *Tulare Lake, supra.*

[27] Both of the documents reflecting a narrow interpretation of sec. 46 emanated from the Bureau's Regional Counsel in Sacramento. I have been unable to determine whether a similar practice was followed in other regions, or whether any of the provisions in earlier contracts providing for control of the sale price of both formerly excess *and* non-excess land were enforced after the Regional Counsel took a different position.

[28] I cannot, however, subscribe to Professor Sax's view that control of the sale price of all lands is required by sec. 46. Although Professor Sax makes a generally persuasive case that there is no sound distinction between formerly excess land and other land receiving project water, when it comes to converting the value added by the taxpayer-subsidized project into cash, the language of sec. 46 will not readily sustain his interpretation. It is difficult, in other words, to argue that the general reference to the control of sale price in the same section as the regulation of ex-

Congress clearly intended that the excess land purchaser be interested in farming the land, not in windfall profits. Failing to control the sale price in the turnaround sale means that in one fell swoop a person can realize the federal subsidy—the incremental amount of value added to the land by the federal project—whether that person is the kind of settler envisioned by Congress or not. It also has the negative effect of reaping this benefit at the expense of the next purchaser of that land, thus impairing the financial position of those who later buy the land and enter into the project.[29]

It is worth noting that excess landowners themselves have recognized the problem created by the failure of this Department to control the sale price of turnaround sales. For example, a representative of the Southern Pacific Land Co., which owns over one hundred thousand acres of excess lands in the Westlands Water District, told a congressional committee three years ago:

> It is obvious that the price gap [between the value of the lands with project water and the value without project water] gives rise to a potential for serious abuse. *The prospect of quick gains has brought in many opportunists who are pressuring to buy the land. This complicates our problem of finding bona fide farmer-buyers.* We intend to do our best in selecting purchasers who do in fact intend to farm the land after it passes out of our hands.
>
> Southern Pacific welcomes suggestions from either the Bureau of Reclamation or another federal agency on how we should screen applications to purchase property not acquired by existing lessees, to determine that the buyers intend to farm the lands themselves.[30] (Italics added.)

This difficulty faced by a conscientious excess landowner trying to comply with the letter and spirit of reclamation law in disposing of its excess lands dramatically illustrates the problem created by the failure to control turnaround sales. Control of the sale price of formerly excess lands will effectively eliminate speculation, and the difficulty.

This result does not prohibit an owner from selling his land at an uncontrolled price. On the contrary, such sales can be made without any scrutiny by the Secretary. The only penalty is the one stated in sec. 46: "[N]o sale of any such lands *shall carry the right to receive* [project] *water* unless and until the purchase

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cess lands sales is a "bizarre grammatical fortuity," as Professor Sax suggests. (64 Mich. L. Rev. at 25.) It is far easier to argue that it was deliberate. The Ninth Circuit expressed its support for Professor Sax's view only in the context of formerly excess lands. The Bureau's 1946 study reflects that the Department's past efforts to control the sale price of *all* lands was regarded as voluntary and somewhat experimental, pursuant to the Secretary's general authority to implement the excess land law. The Report also pointed out instances in which Congress had expressly provided for this broader control on particular projects, thus suggesting, by negative inference, that Congress had not *required* such a result for all projects. *But see* Sax, *op. cit.*, 64 Mich. L. Rev. at 29–30.

[29] *See* Sax, *op. cit.*, 64 Mich. L. Rev. at 19; *see also* Fact Finder's Report, S. Doc. No. 92, 68th Cong., 1st Sess. (1924), pp. 37, 113.

[30] Statement of Ned Smith, Chief Agronomist, Southern Pacific Land Co., to the Joint Hearings Before the Select Committee on Small Business and the Committee on Interior and Insular Affairs, United States Senate (94th Cong., 2d Sess., 1976) pp. 634, 638.

price involved * * * is approved by the Secretary." (Italics added.) Sale at an uncontrolled price eliminates only the right to receive project water. Although this is, to be sure, a valuable right, there is no legal restraint on what someone may do with his or her property apart from it.

Having reached this conclusion, there remains the question whether the Secretary must set the sale price of formerly excess land without *any* consideration of the value added by the federally-subsidized project. Sec. 46 says that the sale of such land shall not carry with it the right to receive federally-subsidized water unless the purchase price is "approved by the Secretary," but it does not at that point set forth standards upon which the Secretary is to act. Earlier in that same section, however, the Secretary is directed to fix the sale price on the basis of its value without any reference to the federal project.

Clearly Congress' intent was that the Secretary control the sale price of excess and formerly excess land to prevent speculative benefits until one-half the construction charges have been paid. It is logical and consistent to use the same standard in setting the sale price of formerly excess lands, until one-half the construction charges have been paid.[31]

VI. EFFECT OF THIS OPINION

The only remaining question is how this opinion should be applied to those who now hold formerly excess land. First, I note that, pursuant to my instruction, the Bureau has resumed its earlier practice, in force for at least some contracts in the period 1926–1949, of inserting in all new contracts with irrigation districts a clause which expressly provide for the control of the sale price of formerly excess lands.[32] Other contracts with irrigation districts and existing recordable contracts are simply silent on this point or provide for control of the sale price of all lands.[33] With respect to those receiving water under these new contracts, there should be no doubt about the Secretary's power to control the sale price of formerly excess land. And the silence of other

[31] The regulations proposed by the Department in August 1977 provided for a two-tiered control. For the first ten years after the excess land was sold, any resale must be for a price not reflecting project benefits. If it is sold after ten years, and until one-half of the construction charges allocated to it have been paid in regularly scheduled installments, the Secretary would "monitor any resale to prevent unreasonable profit from accruing to the seller." See § 426.9(b) 42 FR 43048 (Aug. 25, 1977). Although this might be read to allow some value attributed to the federal project to be included in the sale price after ten years, I believe this result is not consistent with sec. 46. The same standard—excluding all value attributed to the project—should apply both to excess and formerly excess lands, until one-half the construction charges have been paid.

[32] For example, Article 15 of the 1979 San Luis Unit agricultural water service contract with the Westlands Water District provides as follows (italics added):

"Until one-half the construction charges against the lands in the Contractor's service area shall have been paid, no sale of any excess *or formerly* excess lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior."

[33] See Part IV, *supra*.

existing contracts on this point means I am not called upon to decide how the proper interpretation of sec. 46 should be applied in the face of a contract expressly providing otherwise.

Although the Department has not had a consistent and well-articulated position against controlling the sale price of formerly excess land, I assume nevertheless that in recent years agents of the Department have, at least in some regions, failed to control the sale price.

There are several examples where the Department has concluded that prior practice or interpretation was simply erroneous. In some of these, the revised interpretation was made applicable to claims or applications then pending before the Department; *e.g.*, where the interest of the United States in preventing improper disposition of the public lands was deemed to outweigh the speculative interest of oil shale claimants. *United States* v. *Winegar*, 81 I.D. 370 (1974), reversed *sub. nom. Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894 (D. Colo. 1977); *aff'd.* (10th Cir., Jan. 25, 1979) (reversal of long-standing interpretation of application of Mining Law of 1872 to oil shale claimants).[34]

In others, the ruling was made prospective only. For example, in *Issuance of Noncompetitive Oil and Gas Leases on Lands Within the Geologic Structure of Producing Oil and Gas Fields*, 74 I.D. 285 (1967), the Solicitor concluded that, contrary to prior practice, noncompetitive oil and gas lease offers must be rejected if they were included in a known geologic structure any time before the lease was issued. 74 I.D. at 285–86. Failure to apply this principle in the past undoubtedly cost the United States revenue—at a minimum, leases were obtained without competitive bidding or the payment of bonuses. Applying the doctrine to existing leases would have, on the other hand, possibly resulted in the cancellation of scores of leases, some of which could have been almost fifty years old. Consequently, the decision was made prospective only. 74 I.D. at 290. This position was approved in *McDade v. Morton*, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd.* 494 F. 2d 1156 (D.C. Cir. 1974). *See also Franco Western Oil Co.* (*Supp.*), 65 I.D. 427 (1958), approved in *Safarik* v. *Udall*, 304 F. 2d 944 (D.C. Cir. 1962), *cert. den.*, 371 U.S. 901 (1962).

United States v. *Winegar*, *supra*, reviews several reported court decisions which address the issue of whether new administrative interpretations of a statute should be given prospective effect. *See* 81 I.D. at 394–98. Some of the factors to be considered are whether the statute is easily susceptible to more than one interpretation; whether the interpretation being overruled has

[34] Courts have many times held that acquiescence by the government's agents does not estop the government or alter the Secretary's obligation to enforce the law. *See Atlantic Richfield Co.* v. *Hickel*, 432 F. 2d 587, 591–92 (10th Cir. 1970); *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180 (1957); *Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384–85 (1947); *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, 410 (1917).

been followed since enactment of the statute; the nature of the reliance placed on the precedent by the parties; the purpose of the statute or rule in light of public policy; the harm to the parties who have relied on the precedent to their detriment; and the harm either to the government or the public purpose.[35]

Applying these rules in the context of this opinion, the following is clear:

(a) Although sec. 46 is literally susceptible of the interpretation that only the sale price of excess lands must be controlled, its purpose and scope make plain Congress' intent to guard against speculation and to foster achievement of the basic objective of the excess land law.

(b) The contrary interpretation I overrule here was not the one adopted upon enactment of sec. 46. On the contrary, it first appeared in one region of the Bureau 23 years after enactment, and was never expressly extended to other regions. The interpretation I adopt here was the Department's original interpretation.

(c) The nature of "reliance" on this interpretation by reclamation landowners would most commonly take one of two forms: either a purchaser of formerly excess lands has paid fair market value for the land, so that the seller has converted the value added by the Federal Government to cash; or the land has not been resold but the owner has obtained a mortgage on the formerly excess land or other loans or advances in an amount reflecting some or all of the incremental value supplied by the federal project. Beyond this, "reliance" would be mainly if not wholly in the form of an expectation that the land could be sold at an uncontrolled price; *i.e.*, that the seller can, if he or she chooses to sell, convert the value added by the federal project to cash.

(d) The purpose of sec. 46 was to implement the acreage limitation, and to prevent the value added by the federally-subsidized project from going to speculators rather than settlers intent on establishing family farms on the land. It is an important purpose, going directly to the core of the reclamation program.

Considering these factors and the cases discussed above, I believe the following approach best balances the competing considerations of being fair to those who may have relied on non-enforcement and carrying out Congress' intent.

First, with respect to formerly excess land which has already been sold at an uncontrolled price reflecting the incremental value added to the land by federal project water, it would serve no useful purpose now to control the price at which such land may be sold in the future. Such control would merely penalize those who have purchased the land for a

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[35] *See, e.g.*, 81 I.D. at 394–95; *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940); *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

price reflecting the added value provided by the federal project. The windfall profit has already been realized.[36] Although the Bureau could undertake the task of sorting out already consummated sales and proceeding to attempt to recover the windfall profits, the administrative burdens of untangling the past sales and recovering that profit would be significant. Therefore, the control of the sale price should only be exercised at most where formerly excess land has not yet been sold at a price reflecting the value added by the federal project.

There remains the question of how this opinion should be applied to those who have purchased formerly excess land at a controlled price, but have not yet resold it.

It might appear on the surface that these persons would not be penalized by now controlling the price at which land can be sold, since they acquired it at a price which did not reflect project benefits. On closer examination, however, those who have acquired land out of excess status and not yet sold it may have relied to a great extent on the assumption that the sale price of formerly excess lands would no longer be controlled. In making this assumption, these landowners would value their land in financial statements and for tax purposes at current market value, not at the controlled sale price. Furthermore, financial institutions, in at least partial reliance upon past Departmental practice, have taken mortgages on formerly excess lands based on their ability to be sold at current market value. While some lending institutions are legally restricted from holding long-term mortgages on the land for more than 75% of the market value, the local banks and other lenders often make cash advances for crop production taking into account not only the revenues from crop production, but also the landowner's margin of equity over and above the long-term mortgage on the land. Also, in determining whether monthly mortgage payments can be made on time, long-term lenders consider whether a landowner will be able to obtain these cash advances on crop production. Finally, even if the mortgage on the land is not based on full market value or if there is no mortgage at all, almost every landowner must rely to a certain extent on these short-term crop loans and similar cash advances to meet cash-flow needs while the crop is growing. The crop loans are made taking into account the financial statements of the landowners, their equity in the land, and their net worth.

To now require these lands to be sold at a controlled price could in effect seriously undermine the cash position of these landowners, and upset the financial arrangements they and lending institutions have made.

For all these reasons, I have decided this opinion will not apply to

[36] In the words of Professor Sax, the value added by the federally-subsidized reclamation project has been "converted into cash and possibly * * * carried off the project to be used for purposes which are of no interest or advantage to the reclamation program." 65 Mich. L. Rev. at 34.

lands which were acquired, with Secretarial approval, from excess into non-excess status prior to the date of this opinion.[37] However, all who acquire land out of excess status after the date of this opinion, and their financial backers, will be on notice that the sale price of formerly excess land will be controlled until one-half of the construction charges allocated to such lands have been paid, and therefore they have no right to rely on being able to sell formerly excess land at an uncontrolled price, and can adjust financial arrangements and lending practices accordingly.

This result avoids doing violence to the financial position of landowners and lending institutions, while still limiting speculation and carrying out Congress' intent to the extent consistent with notions of fairness.[38]

LEO KRULITZ,
Solicitor.

DELIGHT COAL CORP.

1 IBSMA 186

Decided *June 5, 1979*

Petition for review by the Office of Surface Mining Reclamation and Enforcement (OSM) of the Jan. 29, 1979, decision of Administrative Law Judge Tom M. Allen in a civil penalty proceeding (Docket No. CH 9-4-P). The decision vacated a notice of violation and two orders of cessation issued by OSM under the provisions of the Surface Mining Control and Reclamation Act of 1977.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings

Except in cases governed by 43 CFR 4.1187(e) or 4.1266(b)(7)(ii), a written decision or a written order confirming a ruling from the bench constitutes the initial decision. The written decision or order incorporating the ruling from the bench must comply with 43 CFR 4.1127. The only exception to this rule is when the Administrative Law Judge both specifically states that a ruling from the bench constitutes his initial decision and fully complies with the requirements of 43 CFR 4.1127 in that oral ruling.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

An Administrative Law Judge may raise questions which go to the authority of the Department under the Act even if the parties fail to raise those questions.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

If a party objects to any ruling of or action taken by an Administrative Law Judge it should do so in a manner that the Administrative Law Judge can reconsider his action in light of that objection.

[37] If excess land has been transferred into non-excess status prior to this opinion without Secretarial approval, it is ineligible to receive project water under 43 U.S.C. § 423e (1976). Because Secretarial approval is necessary for water eligibility, it is the date of the Secretarial approval which will control in those circumstances.

[38] This approach is also consistent with Professor Sax's recommendation, 65 Mich. L. Rev. at 45, note 105, although he was arguing for broader control.

4. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

It is imperative both to the just implementation of this Act and to the proper functioning of administrative review within the Department that parties cooperate with the Administrative Law Judge's conduct of the proceeding and with his requests.

5. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who, through ignorance or dishonesty, fail to obtain a permit before engaging in activities regulated by a state.

6. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally

During the initial regulatory program a person may be assessed a civil penalty under 30 CFR 723.1 for violations of a permit condition, a regulation, or a provision of Title V of the Act even though he does not hold a permit from the state regulatory authority.

APPEARANCES: Marye L. Wright Esq., Office of the Field Solicitor (Charleston), Shelley D. Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) sought review of an administrative law judge's (ALJ's) Jan. 29, 1979, decision vacating Notice of Violation No. 78–I–17–3 and Cessation Orders Nos. 78–I–18–2 and 78–I–18–3 issued to Delight Coal Corp. (Delight) on Aug. 18, 1978, under the provisions of sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).[1]

We disagree with the ALJ's holdings that a person cannot be treated as a "permittee" during the initial regulatory program if he does not hold a permit from a state regulatory agency and that if a person does not hold a permit he is not liable for civil penalties. We therefore reverse his decision and remand the case to the Hearings Division.

Factual and Procedural Background

On Aug. 17, 1978, OSM inspected Delight's underground mining operation in Wise County, VA. On Aug. 18, 1978, OSM issued Delight a notice of violation and three orders of cessation. Notice of Violation No. 78–I–17–3 listed alleged violations of five sections of the Act and regulations:[2] (1) 30 CFR 717.12(b) regarding signs; (2) 30 CFR 717.20(a) relating to topsoil handling; (3) 30 CFR 717.14 dealing with retention of nonwaste materials; (4) 30 CFR 717.17(a) requiring sedimentation ponds; and

[1] 91 Stat. 445, 505; 30 U.S.C.A. § 1271(a)(3) (West Supp. 1979). All further citations to U.S.C.A. are from the 1979 West Supplement.

[2] The regulations in 30 CFR, setting forth the initial regulatory program, can also be found in 42 FR 62639 *et seq.* (Dec. 13, 1977).

(5) 30 CFR 717.17(j)(2)(iii) and (iv) specifying haul road construction requirements. Cessation Order No. 78–I–18–1 alleged a violation of sec. 502(d) of the Act, 30 U.S.C.A. § 1252, in Delight's failure to obtain a surface mine permit. Cessation Order No. 78–I–18–2 charged that Delight was mining too close to an occupied dwelling in violation of sec. 522(e)(5) of the Act, 30 U.S.C.A. § 1272. And Cessation Order No. 78–I–18–3 alleged water quality violations under sec. 502(a) of the Act, 30 U.S.C.A. § 1252. On Sept. 13, 1978, Cessation Order No. 78–I–18–3 was amended to state a violation of 30 CFR 710.11(a)(2)(iii), prohibiting any operations that result in significant, imminent environmental harm.

On Sept. 7, 1978, OSM sent Delight a notice that an informal hearing on the cessation orders would be held pursuant to 30 CFR 722.15. This hearing was held on Sept. 13, 1978, and the three cessation orders were orally affirmed. This decision was confirmed by a written decision dated Sept. 25, 1978.

By letters dated Sept. 18, 1978, OSM informed Delight of the proposed civil penalty assessments based on the notice and the orders. Delight filed one-sentence petitions for review of the proposed assessments with the Office of Hearings and Appeals and paid $12,600 into escrow on Oct. 23, 1978.[3]

On Sept. 25, 1978, OSM terminated violations 1 and 3 of the notice of violation on the grounds that Delight had taken the remedial action ordered. Similarly, on Nov. 14, 1978, Order of Cessation No. 78–I–18–2 was terminated after Delight obtained a waiver from the owner of the dwelling that was located within 300 feet of its mining operation.

On Nov. 24, 1978, OSM filed a motion to dismiss the petition for review on the grounds that Delight had failed to state a claim on which administrative relief could be granted and to comply with the requirements of 43 CFR 4.1152.[4]

A hearing was held in Abingdon, Va., on Jan. 5, 1979. At that hearing OSM withdrew its motion to dismiss. The parties entered several stipulations: (1) violations 1 and 3 of the notice were valid; (2) violations 2 and 5 of the notice were valid, but Delight contested the pro-

[3] See 43 CFR 4.1107(*f*). The regulations in 43 CFR, governing procedures for hearings and appeals, can also be found in 43 FR 34376 *et seq.* (Aug. 3, 1978).

The Board notes that 43 CFR 4.1151(a) requires that "[a] petition for review of a proposed assessment of a civil penalty must be filed within 30 days of receipt of the proposed assessment." The record contains only the assessment letters which are dated Sept. 18. It is, therefore, impossible to determine whether Delight's petition was filed within 30 days of *receipt* of the proposed assessment. The Board has already noted the importance of compliance with this procedural regulation. *C&K Coal Co.*, 1 IBSMA 118, 86 I.D. 221 (1979). This lack of evidence as to the date of receipt highlights the need to provide some evidence in the record of the date of receipt of documents, such as by using return receipt requested mail.

[4] 43 CFR 4.1152 specifies what information must be included in a petition for review and provides that the petition must be accompanied by full payment of the proposed assessment.

If OSM intended this motion to be in place of the answer required by 43 CFR 4.1153, it may have missed that sec's. 30-day-from-receipt filing requirement. However, the record does not indicate when OSM received its copy of Delight's petition.

posed assessment; (3) Delight contested both the fact of violation and the proposed assessment for violation 4 of the notice; (4) Order of Cessation No. 78–I–18–1 was validly issued, but Delight contested the amount of the proposed assessment; (5) Order of Cessation No. 78–I–18–2 was not contested and OSM agreed to reduce the penalty assessed to zero; and (6) Delight contested both the fact of violation and the proposed assessment for Order of Cessation No. 78–I–18–3 (Tr. 7–8). The ALJ confirmed these stipulations (Tr. 9).

The hearing, therefore, was directed toward the contested facts and proposed assessments of violation 4 of the notice of violation and the third cessation order and the amounts of the proposed assessments for violations 2 and 5 of the notice and for the first cessation order.

At the close of the hearing, the ALJ indicated from the bench that he would reduce the proposed assessments for violations 2 and 5 of the notice and the first cessation order and would combine violation 4 of the notice and the third cessation order because he felt that these two enforcement actions were duplicative. Such a decision would result in a civil penalty liability of $6,100.

On Jan. 8, 1979, the ALJ issued a memorandum order indicating that, "[p]ursuant to a conference call between the parties," [5] he was vacating the oral order from the bench "in order to prevent a possible miscarriage of justice by a misinterpretation of the law and regulations." In that order the ALJ requested briefs from both parties by Jan. 25, 1979, on three issues:

1. Is a person who does not have a permit to mine coal subject to: (a) P.L. 95–87 (30 U.S.C. § 1201 *et seq.* (1977)); (b) The penalty provisions of 30 CFR 700 *et seq.*
2. If a cessation order is issued to one who is mining without a permit, and that person ceases all mining operations, what is that person's status as far as further civil penalty proceedings are concerned.
3. Can more than one cessation order issue to the same person on the same day for multiple violations of the interim regulations.

The ALJ's order clearly indicated that his "complete and final order * * * [might] differ from the order issued from the bench."

Both parties failed to submit briefs by Jan. 25, 1979. The ALJ issued a written opinion on Jan. 29, 1979, in which he held that, because Delight was not a "permittee" within the meaning of the Act, the civil penalty provisions of sec. 518 of the Act did not apply and that, since one order of cessation was sufficient to close a mine, the issuance of three orders was excessive. Based on these holdings, the ALJ vacated all enforcement actions except Cessation Order No. 78–I–18–1 and ordered that all of the proposed assessment being held in escrow be returned to Delight.

On Feb. 28, 1979, OSM filed a "Notice of Appeal." Under 43 CFR 4.1158 review of decisions of an

[5] There is no record of this conference call in the file. This failure to record the contents of conversations concerning a case is discussed *infra* at pp. 326, 327.

ALJ concerning civil penalty assessments are by petition to the Board in accordance with 43 CFR 4.1270 which provides that granting petitions for review of civil penalty decisions lies within the discretion of the Board. Because of the heading of OSM's submission, the Board treated it as a "notice of appeal" rather than as a "petition for review." The acknowledgment letter sent to the parties indicated that 43 CFR 4.1273 would govern the presentation of briefs. Because of the error by both OSM and the Board on this point, the Board will treat the acknowledgment letter as a grant of a petition for review for purposes of this case.[6]

OSM filed its brief on Mar. 30, 1979. Delight did not file a brief.[7]

Discussion

[1] At the conclusion of its brief OSM argues that the ALJ's ruling from the bench was "final agency action" for the Department and could not be changed unless appealed by one of the parties. As support for this argument it cites that part of 5 U.S.C. § 557 (1976) which reads "[w]hen the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule." OSM also cites 43 CFR 4.1127 which provides that "[a]n initial * * * decision disposing of a case shall incorporate—(a) Findings of fact and conclusions of law and the basis and reasons therefore [*sic*] on all the material issues of fact, law, and discretion presented on the record; and (b) An order granting or denying relief."

It is clear that what the ALJ said at the conclusion of the hearing in this case did not constitute what is required by sec. 4.1127. The regulations specifically provide for oral initial decisions in two instances in which a rapid decision is essential: (1) expedited review under 43 CFR 4.1187(e) and (2) temporary relief cases under 43 CFR 4.1266(b)(7)(ii). In all other cases an ALJ presumably "rules" from the bench in order to give the parties a prompt indication of his thinking. The Board will not construe a ruling from the bench as an initial decision unless it fully complies with sec. 4.1127 and unless the ALJ explicitly states at the time that he intends it to be his initial decision. To hold otherwise would mean that the period for the filing of notices of appeal or petitions for review would begin to run from the date of the hearing, even though the parties

[6] The Board notes that all of OSM's previous and subsequent submissions in the case were clearly titled "Civil Penalty Proceeding," as were all the ALJ's statements and documents concerning the case. Because OSM filed a "notice of appeal" rather than a "petition to review" it did not attach a copy of the ALJ's decision appealed from as it would have been required to do under the provisions governing petitions to review (43 CFR 4.1270(c)).

[7] Regardless of the circumstances of a particular case, parties are reminded that there is a very real danger that failure to participate before the Board as well as the ALJ may result in a determination adverse to their position. *See Dean Trucking Co., Inc.*, 1 IBSMA 105, 111–12 and n. 4, 86 I.D. 201, 203–04 (1979).

did not have any written record of the ALJ's decision. Further, although prompt decisions are desirable, deliberation should not be sacrificed to expedition. If an oral statement from the bench were deemed an initial decision it would deprive an ALJ of the opportunity to consider the record and to write a decision which carefully sets forth findings of fact and conclusions of law and the basis and reasons therefor on all the material issues of fact, law, and discretion presented as required by sec. 4.1127.

Therefore, except in cases governed by 43 CFR 4.1187(e) or 4.1266(b)(7)(ii), a written decision or a written order confirming what was said from the bench constitutes the initial decision. The written decision or order incorporating what was said from the bench must be in accordance with 43 CFR 4.1127. The only exception to this general rule is when the ALJ both specifically states that a ruling from the bench constitutes his initial decision and fully complies with the requirements of 43 CFR 4.1127 in that oral ruling.[8]

[2] OSM also argues that 43 CFR 4.1121 limits an ALJ to deciding those issues actually presented by the parties and does not authorize him to raise other questions *sua sponte*.[9] The difficulty with this argument is that the first issue raised by the ALJ in his memorandum order of Jan. 8, 1979, and the issue which was central to his initial decision of Jan. 29, 1979, could be considered jurisdictional in nature. In the ALJ's view, if Delight were not a permittee under the Act and the regulations, then OSM would have no authority to regulate it or to take enforcement actions against it during the initial regulatory program. An ALJ may raise questions which go to the authority of the Department under the applicable law even if the parties do not do so. *See Eastern Associated Coal Corp.*, 4 IBMA 1, 15, 82 I.D. 22, 29 (1975).

[3] Two additional problems arise from the Jan. 8 memorandum order, both of which are complicated by the failure of either the ALJ or the parties to place a record of the preceding conference call in the file. First, it is impossible to know whether or not either party objected to the ALJ's intention to vacate his ruling from the bench at that time. Nor is there any other indication that any objection to this procedure was raised before the

[8] Presumably, the ALJ retains jurisdiction to supplement, qualify, or otherwise modify that decision until the occurrence of one of the three events listed in 43 CFR 4.1121(c):

"(c) Except as otherwise provided in these regulations, the jurisdiction of an administrative law judge shall terminate upon—

"(1) The filing of a notice of appeal from an initial decision or other order dispositive of the proceeding;

"(2) The issuance of an order of the Board granting a petition for review; or

"(3) The expiration of the time period within which a petition for review or an appeal to the Board may be filed."

[9] This is a recurring theme in OSM's presentations to the Office of Hearings and Appeals. In the sense that neither the Hearings Division nor this Board can summon a case from below on its own initiative, *sua sponte* activity is prohibited. As to determinations of jurisdiction or to being confined to the parties' theories of the case, *sua sponte* is of doubtful relevance. In regard to matters falling between those extremes, it will be appropriate to flesh out the theory and application as specific cases involving specific facts come before us.

ALJ. If a party objects to any ruling of or action taken by an ALJ it should do so in a manner that permits the ALJ to reconsider in light of that objection. When a party fails to raise its objections before the ALJ, but instead chooses to present them for the first time on appeal to the Board, it runs the double risk of receiving an adverse decision from the ALJ and a possible affirmance by the Board.

[4] The lack of a record of the conference call also means that the Board cannot tell whether either OSM or Delight informed the ALJ that it would not submit a brief. In any event, it is imperative both to the just implementation of this Act and to the proper functioning of administrative review within the Department that parties, and especially the Department, cooperate with the ALJ's conduct of the proceeding and with his requests.[10] The Board has already noted the problems arising from the lack of representation on appeal. *See Dean Trucking Co., Inc.*, 1 IBSMA 105, 111–12 and n. 4, 86 I.D. 201, 203–04 (1979). In this case, both sides declined to participate in the development of answers to questions the ALJ indicated were important to his resolution of the case and, indeed, failed to make any response on the record. The ALJ was thus placed in an untenable situation: in effect he was forced to represent both sides and to decide impartially between his own arguments on what he considered to be the central question—whether OSM had authority over Delight.

The Board disagrees with the ALJ's answer to that central question. Sec. 502(c) of the Act, 30 U.S.C.A. § 1252, establishes the initial regulatory program: "On and after nine months from the date of enactment of this Act, all surface coal mining operations on lands on which such operations are regulated by a State shall comply with [certain of the reclamation requirements of sec. 515]." Sec. 515 is written for the permanent state or federal program and assumes that either the state or the federal government is properly implementing a permit program. Acting on Congress' stated intention that certain operational and reclamation standards apply during the initial regulatory program, the Secretary defined "permittee" in 30 CFR 700.5 in such a way as to insure that all persons conducting surface coal mining and reclamation operations would be covered during the initial program, despite possible differences in the operation of existing state regulatory schemes:

> [A]ny individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization holding a permit to conduct surface coal mining and reclamation operations issued by a State regulatory authority pursuant to a State program or by the Secretary pursuant to a Federal program or a Federal lands program. *During the initial regulatory program the term includes persons conducting surface coal mining and reclamation operations regulated by a State under State law* or conducting such operations

[10] 43 CFR 4.1121(a)(6) grants the ALJ the power to "regulate the course of the proceeding."

under a mining plan approved pursuant to Part 211 of this title. [Italics added.]

[5] Although the Act and its implementing regulations contemplate that persons conducting surface coal mining and reclamation operations will obey the law and obtain the required permit, the definition of "permittee" adopted by the Secretary for the initial regulatory program includes those persons who, through ignorance or dishonesty, fail to get a permit from the proper regulatory authority before engaging in activities regulated by a state.

Delight did not dispute either that it was conducting a "surface coal mining" operation or that Virginia law required it to obtain a surface mining permit. Indeed, Delight obtained a permit while these enforcement actions were pending (Tr. 37). We find, therefore, that Delight is a "permittee" under the initial regulatory program.

[6] During the initial regulatory program the same definition of "permittee" applies to the regulations implementing sec. 518(a) of the Act, 30 U.S.C.A. § 1268(a), which states that "any permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty." The Secretary has followed the Act's language in covering those persons who fail to obtain a permit under 30 CFR 723.1, the section of the initial regulatory program provisions relating to the assessment of civil penalties: "This Part covers the assessment of civil penalties under section 518 of the Act for violations of a permit condition, *any provisions of Title V of the Act, or any implementing regulations.*" (Italics added.) According to this language a person may be assessed a civil penalty for violations of a permit condition, a regulation, or a provision of Title V of the Act. There is no requirement that, during the initial regulatory program, a person responsible for abiding by those provisions must actually hold a permit in order to be subject to civil penalties for violating them.

Delight admitted violations of the regulations and of Title V of the Act. During the initial regulatory program it may be assessed civil penalties based on those violations regardless of the fact that it did not hold a surface mining permit from the state regulatory authority.

We therefore hold both that Delight is a "permittee" during the initial regulatory program and that it is liable for civil penalties based on violations of the Act or regulations. ALJ Allen's decision of Jan. 29, 1979, is therefore reversed, and this case is remanded to the Hearings Division for further action consistent with this decision.[11]

WILL A. IRWIN,
Chief Administrative Judge.
MELVIN J. MIRKIN,
Administrative Judge.
IRALINE G. BARNES,
Administrative Judge.

[11] We intimate no opinion on the correctness of the ALJ's vacating of two of the cessation orders since neither party briefed that issue either for the ALJ or the Board. While we do not suggest that this failure to brief an issue precludes the Board from deciding it, or any other issue, we refrain from exercising our power to do so in this case.

APPEAL OF CITY WINDOW CLEANERS

IBCA–1218–10–78

Decided *June 12, 1979*

Contract No. 68–03–6025, Environmental Protection Agency.

Dismissed.

1. Contracts: Formation and Validity: Legality—Contracts: Formation and Validity: Authority to Make

Where an award is made to a firm while one of the partners is under debarment for violation of a labor statute due to administrative oversight, the contracting officer is without authority to make a valid award, and the purported contract is void ab initio.

2. Contracts: Disputes and Remedies: Jurisdiction

The award of a contract to a statutorily debarred bidder was properly canceled upon discovery of the debarred status and there being no valid contract between the parties, the Board is without jurisdiction to consider an appeal.

APPEARANCES: Mr. Laurence E. Thorp, Attorney at Law, Lively & Wiswall, Springfield, Oregon, for appellant; Mr. Richard V. Anderson, Government Counsel, Cincinnati, Ohio, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

On Motion to Dismiss

This is an appeal from a termination for default issued on July 19, 1978, after appellant has refused to continue contract performance on July 18, 1978. Appellant seeks conversion of the termination action to one for the convenience of the Government and seeks to recover a total of $9,486.98. The Government filed an answer and motion to dismiss on the grounds that the Board lacks jurisdiction because the award of the contract became void upon discovery by the Government of appellant's debarred status. The parties have submitted the appeal for decision on the record.

Background

On Apr. 26, 1978, appellant was awarded a contract for providing custodial services for Government facilities in Corvallis, Oregon. The award was based on appellants low bid of $3,235.54 a month submitted in response to an advertised invitation for bids (IFB). Appellant's bid dated Mar. 21, 1978, was signed by Eve M. Roman as owner of the offering firm, "City Window Cleaners." On Page 2 of the Solitation Offer and Award Form 33, appellant represents that the type of business organization is a partnership (AF–3).[1]

Upon issuance on Feb. 13, 1978, the IFB contained the following notation in schedule item 13(h): "Applicable Minimum Hourly Rates of Wages, applicable to contracts in excess of $2,000 will be furnished contractor as soon as it is available." Amendment No. 1 to the IFB was issued on Mar. 9, 1978,

[1] All references to the Appeal File use the abbreviation AF.

extending the bid opening to Mar. 28, 1978, deleted schedule item 13(h) and substituted in lieu thereof: "(h) U.S. Department of Labor Wage Decision No. 74-249 Rev 5 dated Jan. 20, 1978." The referenced wage determination specified a minimum hourly wage of $5.44 for "Janitor, porter cleaner," and certain fringe benefits. A copy of Amendment No. 1 executed by Eve M. Roman on Mar. 21, 1978, is included in AF-3.

During May 1978, appellent commenced performance of the contract and requested the contracting officer to increase the monthly contract rate from the bid amount of the minimum wage to the higher wage rates required by the above referenced Department of Labor wage decision (AF-5). The request was denied by the contracting officer by letter dated June 19, 1978 (AF-5). Despite the denial of the price increase, appellant continued to submit invoices at the higher rates requested. Appellant's invoice for May in the amount of $4,983.72 was paid on July 21, 1978, at the contract price of $3,235.54. The invoice for June in the amount of $4,983.72 was paid on Aug. 24, 1978, at the contract price of $3,235.54 (Government Answer).

The contracting officer's record of telephone conversations with appellant indicate a series of calls from and to Ernest Roman in mid-July 1978 (AF-5). Ernest Roman, husband of Eve Roman, initiated a call on July 13 to attempt to secure the requested increase in contract price. On July 14 Ernest Roman called to indicate he would not furnish any documentation to support the claimed increase, but would pull off the job on the basis of the Government breach of the contract if the contract price was not increased. Later on July 14, the contracting officer called Ernest Roman to ask whether he was currently disbarred by GAO decision B-3368 dated Apr. 3, 1978. Receiving no direct response, the contracting officer sent a telegraphic message to appellant on July 14, 1978, requesting by July 21, 1978, a copy of the legal partnership agreement upon which appellant's firm is based and a letter setting forth the exact legal relationship of Ernest Roman with appellant (AF-5). The requested information was never furnished. On July 17, a Mr. T. Stevens of City Window Cleaners called as General Manager, and the contracting officer advised that a letter of inquiry respecting Ernest Roman's debarred status was being sent to the Department of Labor. On July 18, Mr. T. Stevens of City Window Cleaners advised the Government project officer that City Window Cleaners would pull off the contract. No employees of appellant appeared for work that evening. On July 19, 1978, the contracting officer talked with Mr. Stevens who repudiated the contract on the grounds that the Government had breached the contract.

By telegraphic message on July 18, 1978, the contracting officer set forth the substance of the above exchanges. He also directed that

performance of the contract be continued and advised that otherwise it would be terminated for default. On July 19, 1978, a telegraphic message from the contracting officer to City Window Cleaners terminated appellant's right to proceed with performance of the contract under the termination for default clause for the failure to provide services on July 18, 1978, and the oral repudiation of the contract by T. Stevens on July 18 and July 19, 1978 (AF-1).

By letter dated July 17, 1978, the contracting officer requested the Department of Labor to investigate Ernest Roman's interest in City Window Cleaners and to advise whether this involvement bars City Window Cleaners from holding this contract. The Department of Labor responded in a letter dated Oct. 2, 1978 (AF-6). The response advised of two Oregon firms operating as City Window Cleaners and one as Contract Maintenance, Inc., all located at the same physical address. The latter firm, Contract Maintenance, Inc., with Ernest Roman as the registered agent with Oregon's Corporation Division, is listed on the GAO decision B-3368 of Apr. 3, 1978, showing debarment for breaching the agreements and representations required by the Service Contract Act of 1965, 41 U.S.C. § 351 *et seq.* (1976) (AF-5 and supplemental submission dated Feb. 8, 1979, by Government counsel). By letter of Nov. 2, 1978, the contracting officer canceled the contract as void ab initio on a finding that Ernest Roman, a debarred bidder, did have a substantial interest in City Window Cleaners.

Findings of Fact and Decision

In order to ascertain whether the Board has jurisdiction to proceed, the Board must undertake to determine the validity of the contract under which an appeal is brought. (*P.E.C. Corp.*, ASBCA No. 14241, Dec. 31, 1969, 69-2 BCA 8056 and cases cited at page 37,434.)

The affidavits of the contracting officer and project officer are directly in conflict with those of Eve and Ernest Roman regarding the extent to which Ernest Roman exercised managerial control over City Window Cleaners during the bid and performance period. However, both Eve and Ernest Roman admit to Ernest Roman's principal role in the conduct of the business of City Window Cleaners in the years prior to the instant contract. Both claim that this role had ended in the months immediately preceding this contract and that Ernest Roman's involvement in this contract was solely that of unpaid adviser to his wife.

The evidence of record is also contradictory and inconsistent regarding the ownership and control of City Window Cleaners. Appellant's bid includes both a signature of Eve Roman as owner and the representation that the firm was a partnership. Counsel for appellant identifies City Window Cleaners as a partnership in the notice of appeal of Aug. 17, 1978, but does not identify the

partners. The affidavit of Margaret Novak to the effect that Ernest Roman hired her to supervise the contract work is supported by the project manager, Mr. Robert Trippel. He states that upon calling City Window Cleaners on Apr. 26, 1978, to get the job started, he was given Ernest Roman's home phone number. A call to Ernest Roman at that number provided the information that Margaret Novak would run the job and her phone number. The action of hiring the key individual to hire employees and to supervise performance is a direct and tangible involvement in the contract performance. We also note that the debarred firm of Contract Maintenance Inc., and City Window Cleaners share P.O. Box 2769 in Eugene, Oregon.

Some weight must be given to the fact that appellant's threats to pull off the job and the actual abandonment of performance came immediately after the contracting officer requested specific information on the partnership that was City Window Cleaners and Ernest Roman's involvement. Appellant did not respond to this request and the record is devoid of this information. If, in fact, Ernest Roman is no longer a partner in City Window Cleaners, appellant could easily prove that by disclosing the partners in the firm. The failure to do so raises a strong inference that the ownership had not changed at the time this contract was awarded.

[1] Appellant contends that the alleged debarment of Ernest Roman should not extend to his wife. In an unpublished opinion, B–160179, Dec. 12, 1966, (11 CCF 80,837) the Comptroller General upheld the Government's action to refuse a contract award to a wife claiming to be sole owner of the company, where her son and husband were on the debarred list and were connected with the firm. There, as here, she refused to make a frank disclosure of the interest of the debarred family members and it was found that the possibility of the existence of a community of interest in the firm was reasonably inferred. Similarly, that record did not affirmatively establish the debarred family members' interest, but the Government's action in considering the integrity of the bidder's family was deemed proper.

In the circumstances of the instant case, the failure to disclose the ownership of the firm on request, the history of common ownership of Ernest and Eve Roman, and the direct involvement of Ernest Roman in acting under the contract have led us to conclude that Ernest Roman did have a substantial interest in City Window Cleaners.

[2] At the time the contract was awarded, Ernest Roman was on the debarred bidders list pursuant to GAO decision B–3368, dated Apr. 3, 1978. In the circumstances present here the award to City Window Cleaners contravened the statutory prohibition against awarding contracts to debarred bidders (see unpublished decision B–150870, June 17, 1963, of the Comptroller Gen-

eral).[2] Accordingly, the contracting officer lacked authority to award the contract to appellant and the purported contract was void. Having made the award through administrative error, being unaware of Ernest Roman's debarred status, the contracting officer properly canceled the contract as void after ascertaining the facts.

There being no valid contract between the parties, the Board is without jurisdiction to consider the appeal. The Government's motion is therefore granted and the appeal is dismissed.

RUSSELL C. LYNCH,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

ALASKA NATIVE DISENROLLMENT APPEALS OF: JAMES EDWARD SCOTT, SR. & ROBERT CHARLES SCOTT

7 IBIA 157

Decided *June 21, 1979*

Appeals from a decision of an Administrative Law Judge declaring appellants were improperly enrolled under the Alaska Native Claims Settlement Act.

Affirmed in part and reversed in part.

1. Alaska Native Claims Settlement Act: Enrollment: Metlakatla Natives

The appearance of one's name on the Metlakatla Indian community rolls of the Annette Islands Reserve in 1976 in itself is not conclusive of membership status. However, that fact considered in conjunction with other evidence indicating active involvement and contact with the community over the years including the year 1970 does not constitute continuous absence from the community.

2. Alaska Native Claims Settlement Act: Enrollment: Metlakatla Natives

Absent active involvement and contact and continuous absence of 2 years prior to Apr. 1, 1970, by a minor born outside the Metlakatla community and having never resided therein constitutes forfeiture of membership in the community, derived solely through a parent member of that community.

APPEARANCES: Peter A. Danelo, Esq., Preston Thorgrimson, Ellis, Holman & Fletcher, Seattle, Washington, for James Edward Scott, Sr., and Robert Charles Scott, appellants; Bruce Schultheis, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the United States of America, appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

Pursuant to complaints filed by the United States of America through the Bureau of Indian Af-

[2] "It is significant to note too that the issuance of this purchase order to your firm while it was under debarment, effective Apr. 24, 1962, under the Walsh-Healy Act was in contravention of the statutory prohibition in section 3 of the act, 41 U.S.C. 37, against awarding contracts to debarred firms. This would have been sufficient reason in itself to cancel the purchase order if the purchasing activity had sought to rely upon it."

fairs, hereinafter referred to as appellee, on Mar. 1, 1978, under the provisions of 43 CFR Part 4, subpart K, which alleged that James Edward Scott, Sr., and Robert Charles Scott, hereinafter referred to as appellants, were improperly enrolled under the Alaska Native Claims Settlement Act, a consolidated hearing on the complaints was held on May 4, 1977, in Seattle, Washington, by Chief Administrative Law Judge L. K. Luoma.

Thereafter, Judge Luoma in his decision of Dec. 4, 1978, concluded that the appellee had met its burden of proof that appellants were members of the Metlakatla community as of Apr. 1, 1970, and that they were therefore improperly enrolled under secs. 3, 5, and 19 of the Alaska Native Claims Settlement Act of Dec. 18, 1971, 85 Stat. 688 (43 U.S.C. § 1601 (1976)), and ordered appellants' names stricken from the roll of Alaska Natives.

A timely appeal was filed by appellants on Jan. 3, 1979, with the Director, Office of Hearings and Appeals. The Director, under the authority of 43 CFR 4.1010 and 4.704 designated the Board of Indian Appeals to decide these cases along with all other Alaskan Native disenrollment appeals on an ad hoc basis.

Appellants in support of their respective appeals allege as follows:

(1) The complaints should have been dismissed under 25 CFR 43(h).15(e) because there was no mention in the complaints of membership in the Metlakatla community as of Apr. 1, 1970, and no timely amendment was made of the complaints.

(2) James E. Scott, Sr., forfeited his membership in the Metlakatla community through his continuous absence from the community prior to Apr. 1, 1970.

(3) Robert C. Scott's rights under the Act were unfairly made to depend solely on the membership of his father in the Metlakatla community; moreover, Robert C. Scott had forfeited his membership in the community through his continued absence from the community prior to Apr. 1, 1970.

The dispute as we see it focuses around the interpretation of Article 2, sec. 6 and Article 2, sec. 4, Part 5 of the constitution and bylaws of the Metlakatla Indian Community.[1 & 2] More particularly does it involve the interpretation of the word "continuous" as it appears in the constitution and bylaws.

We find no merit in appellants' first contention regarding dismissal of the complaints. Under the amended regulations (25 CFR 43 (h).15(e), July 20, 1978) the appel-

[1] Article II, sec. 6, provides in relevant part: "Continuous absence from Annette Islands Reserve for two years or longer, unless the member so absent shall notify the Council in writing, within such two-year period, of his intention to return, shall constitute forfeiture of membership in the community."

[2] Article II, sec. 4, part 5 provides: "Minor children of persons so admitted shall be members of the community, but upon attaining their majority they shall, in order to continue their membership, proceed as set forth in Paragraph 3 above." (Para. 3 referred to above reads as follows: "In the presence of the Mayor and Council, the declaration in section 2 of this Article shall be read to the applicant, and he or she shall sign a copy of the declaration before two witnesses.")

lee had the burden of proving enrollment in the community on Apr. 1, 1970. The appellee at the hearing alleged and produced evidence that appellants were enrolled in the community as of Apr. 1, 1970, and that the complaint was therefore considered amended and in conformity with the new regulations.

Concerning appellant James Scott's contention as set forth in item 2 above, we find for the reasons hereinafter set forth that he was a member of the community as of Apr. 1, 1970.

[1] The fact that James Scott's name appeared on the community's rolls in 1976 in itself is not conclusive of his membership status. However, that fact considered in conjunction with other evidence indicating his active involvement and contact with the community over the years since his enrollment in 1965, including the year 1970, did not in our opinion constitute continuous absence from the community, notwithstanding his residence in the State of Washington during those years. Accordingly, being a member of the community as of Apr. 1, 1970, he was ineligible for enrollment under the Act as found by Judge Luoma whose finding to that effect is affirmed.

[2] Contention 3 regarding Robert Scott presents an altogether different situation from that of his father, James Scott. Robert Scott's purported membership in the community derives solely from his being the minor child of a member, pursuant to the community's constitution and bylaws.[3]

It is the contention of appellant, Robert Scott, an adult since Nov. 11, 1976, that his rights under the Act were unfairly made to depend solely on his father's membership in the community; moreover, that he had forfeited his membership in the community through his continuous absence from the community from prior to Apr. 1, 1970. Robert Scott was born in the State of Washington on Nov. 11, 1959, and has resided there ever since. Unlike his father, Robert Scott has not been actively involved or in contact with the community. For the foregoing reasons we are in agreement with his contention that his membership in the community was forfeited by his continuous absence prior to Apr. 1, 1970. Accordingly, we find that Robert Scott was properly enrolled under the Act and Judge Luoma's finding to the contrary must be reversed.

NOW THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals and pursuant to 43 CFR 4.704, it is hereby ordered that the order of Dec. 4, 1978, insofar as it pertains to James Edward Scott, Sr., is affirmed, and as to that part that pertains to Robert Charles Scott is reversed, and Robert Charles Scott's name is ordered reinstated on the roll of Alaska Natives.

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[3] See footnote 2, *supra*.

This decision is final for the Department.

ALEXANDER H. WILSON,
Chief Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

WESTERN ENGINEERING, INC.

1 IBSMA 202

Decided *June 22, 1979*

Appeal by Western Engineering, Inc., from the Feb. 9, 1979, decision of Administrative Law Judge Joseph E. McGuire in a temporary relief proceeding (Docket No. NX9-22-R). The decision denied applicant's request for temporary relief from a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement.

Reversed and Remanded.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

When an interim regulatory provision is ambiguous when applied to a particular operation, and its intended meaning is not clarified by reference to the interim regulatory provisions as a whole and other pertinent interpretive materials, that provision may be construed in favor of the entity seeking relief from its application.

APPEARANCES: James G. Tyler, Esq., Hagedorn and Tyler, Tell City, Indiana, and William T. Bennett, Esq., Wyatt and Salzstein, Washington, D.C., for Western Engineering, Inc.; John Philip Williams, Esq., Office of the Field Solicitor (Knoxville), Michael J. Kurman, Esq., Office of the Solicitor, and Marcus P. McGraw, Assistant Solicitor for Enforcement, Office of the Solicitor, all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

An appeal has been filed with the Board by Western Engineering, Inc. (Western), from an Administrative Law Judge's (ALJ's) denial of its application for temporary relief from Notice of Violation No. 79-II-21-1, issued to Western by the Office of Surface Mining Reclamation and Enforcement (OSM) on Jan. 25, 1979, pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).[1] In this notice, OSM indicated that Western had failed (1) to cause surface drainage from three portions of its operation to be passed through a sedimentation pond and (2) to maintain the level of suspended solids and pH in discharges from two portions of the operation within required limits. Both of these conditions were specified as violations of 30 CFR 715.17 (interim requirements for the protection of the hydrologic system).[2] On Jan. 26, 1979, OSM modified the notice to specify additional violations of 30 CFR 715.17.

[1] 91 Stat. 445, 505; 30 U.S.C.A. § 1271(a)(3) (West Supp. 1979). All further citations to U.S.C.A. are from the 1979 West Supplement.

[2] The regulations in 30 CFR, setting forth the initial regulatory program, may also be found in 42 FR 62639-62716 (Dec. 13, 1979).

Western does not dispute the factual basis for the violations of 30 CFR 715.17 found by OSM at its operation; rather, in this appeal Western seeks a reversal of the ALJ on three alternative grounds: (1) that Western's operations do not constitute "surface coal mining operations" within the meaning of the Act and interim regulations, and, thus, are not subject to OSM's authority; (2) that the Act does not authorize the issuance of a notice of violation to an entity that does not have a state mining permit; and (3) that the notice issued to Western is void because OSM did not provide the regulatory authority for Kentucky with an opportunity to take appropriate action prior to its issuance. We find that since the definition of "surface coal mining operations" in the Act and regulations is ambiguous as it applies to Western's operations, and since it is not clear from the provisions of the initial regulatory program, taken as a whole, that operations such as Western's were intended by the Secretary to be subject to those provisions, the decision of the ALJ must be reversed.

Factual and Procedual Background

Western Engineering, Inc., is a family-owned, Indiana corporation licensed to do business in the Commonwealth of Kentucky. The company operates a river terminal on the Green River in Ohio County, Kentucky.

Since 1974, Western has made use of its river terminal exclusively for the preparation and loading of coal for river barge shipments, primarily to utilities (Tr. at 16; 42). The equipment employed by Western in this activity includes a truck scale, a double row crusher, a rotary coal breaker, two dump truck feed hoppers, various conveyor belts and vehicles, a barge used as a loading platform, and a tugboat (Tr. at 15). In the course of handling coal, Western sprays it with water or takes other measures to control the emission of dust, and sometimes crushes it to render its handling easier for Western and the consumer (Tr. at 17; 20–21; 41–45).

Western receives coal exclusively from strip mines, the nearest of which is 10 to 12 miles and the farthest of which is approximately 50 miles from its terminal (Tr. at 16). Western does not own or lease any coal mines, nor does it purchase any of the coal it loads for shipping; rather, the company is a contract handler of coal (Tr. at 18; 24–26).

On Jan. 23 and 25, 1979, an OSM inspector visited and inspected Western's river terminal. On the latter day, the inspector issued to Western Notice of Violation No. 79–II–21–1, pursuant to sec. 521 (a)(3) of the Act. Two violations of 30 CFR 715.17(a) were indicated in the notice: (1) that the surface drainage from three areas of Western's operation does not pass through a sedimentation pond and (2) that discharges from two areas of Western's operation do not meet the effluent limitations for sus-

pended solids and pH. The company was ordered to abate the violating conditions before Feb. 7, 1979.

After the notice was issued, laboratory analysis of several water samples taken during the January 23 and 25 inspections of Western's operations revealed additional violations of the Department's interim effluent limitations for pH and iron. On Jan. 26, 1979, OSM modified the January 25 notice to include these violations.

Western filed both an Application for Review of the Notice of Violation [3] and an Application for Temporary Relief [4] with the Hearings Division of the Office of Hearings and Appeals on Feb. 6, 1979. A hearing on the latter application was held on Feb. 9, 1979, in Evansville, Indiana. At the conclusion of this hearing the ALJ ruled from the bench and denied Western's request for temporary relief.[5] On Mar. 7, 1979, the ALJ issued a written decision confirming his bench ruling.

On Mar. 7, 1979, Western filed with the Board its Notice of Appeal from the decision of the ALJ. The Board ordered expedited briefing of the matter; Western filed its brief on Mar. 19, 1979, and OSM filed a reply brief on Mar. 30, 1979. The Board granted subsequent motions by each of the parties to file supplemental briefs, which were received by the Board, Apr. 18, 1979, from Western, and Apr. 27, 1979, from OSM. On May 24, 1979, the Board heard oral argument on the matter.

[3] This application was filed pursuant to 43 CFR 4.1161. The regulations in 43 CFR, governing procedures for hearings and appeals, can also be found in 43 FR 34376–34400 (Aug. 3, 1978).

[4] This application was filed pursuant to 43 CFR 4.1261.

[5] The ALJ's findings and order are recorded in the transcript of the hearing at 129–30:

"1. On or about January 23, 1979, applicant Western Engineering, Incorporation, [*sic*] was engaged in 'surface coal mining operations', as that term is defined in Section 701 (28) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S. Code 1291 (28)).

"2. On or about January 23, 1979, applicant, Western Engineering, Incorporated, was operating under and subject to the provisions of the Surface Mining Control and Reclamation Act of 1977 (Public Law 95–87, — that's Public Law, PL 95–87, — and 91 Stat. 468, 30 U.S. Code 1201 et sequitur.)

"3. Notice of violation 79–II–21–1, dated January 25, 1979 and amended on January 26, 1979 alleges that the applicant firm has violated 30 CFR 715.17 in a matter specifically set forth, therein.

"4. The Secretary or his authorized representative has not ordered a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the conditions, practices or violations alleged in Notice of Violation 79–II–21–1, nor has the applicant firm ceased, slackened or modified its coal mining operations as a result—as a direct or indirect result of the issuance of said notice of violation.

"5. In support of its application for temporary relief, the applicant firm has failed to show that there is a substantial likelihood that the decision herein would be favorable to the applicant firm.

"6. Similarly and also in support of its application for temporary relief, the applicant firm has failed to show that the granting of such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air or water resourecs.

"The order being entered then will read as follows: Based upon the testimony adduced at the Hearing conducted on February 9, 1979 by the undersigned in Evansville, Indiana, a location within the locality of the permit area and one which was selected by applicant firm's counsel, on applicant firm's request for a temporary relief and a Hearing in which both parties were granted an opportunity to be heard, the applicant firm's application for temporary relief is herein denied. Further administrative proceedings in the matter of the violations alleged in notice of Violation 79–II–21–1, are in order and an evidentiary hearing in connection, therewith, will be subsequently scheduled."

Issues

There are three issues presented on appeal. The first is whether Western's river terminal operations constitute "surface coal mining operations" within the meaning of this term as it is used in the interim regulations; the second is whether OSM has authority to issue a notice of violation to an entity which does not hold a State mining permit; and the third is whether sec. 521(a)(1) of the Act requires, during the initial regulatory program, that OSM notify the State regulatory authority at least 10 days prior to issuing a notice of violation.[6]

Discussion and Conclusions

[1] Western's principal argument in support of its appeal, and that which was the focal point of the hearing and oral argument, is that its river terminal operations are not "surface coal mining operations" within the meaning of this term in the Act and interim regulations. Thus, the starting point for our analysis is the definition of this term set forth in the interim regulations at 30 CFR 700.5:[7]

(1) *Activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of Section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce.* Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce *at or near the mine site:* provided, however, that such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal exploration subject to Section 512 of the Act; and (2) *The areas upon which such activities occur or where such activities disturb the natural land surface.* Such areas shall also include any adjacent land, the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage and excavation, workings, impoundments dams, ventilation shafts, entryways refuse banks, dumps, stockpiles, overburden piles, spoil banks, cum [*sic*] banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to such activities. [Italics supplied.]

The *activities* embraced by this definition are, in general terms, those "conducted on the surface of lands *in connection with a surface coal mine* * * *, the products of which enter commerce or the operations of

[6] Because of our holding with respect to the principal issue presented in this appeal, we do not reach in this decision the other issues presented, except to note that the operation of sec. 521(a)(1) of the Act during the initial regulatory program is controlled by our recent decision in *Dayton Mining Co., Inc. and Plateau, Inc.*, 1 IBSMA 125, 86 I.D. 241 (1979).

[7] Essentially the same definition of "surface mining operations" appears in the Act in sec. 701(28), 91 Stat. 445, 516, 30 U.S.C.A. § 1291(28).

which directly or indirectly affect interstate commerce." (Italics supplied.) The definition also embraces the areas of land "upon which such activities occur" and those areas otherwise disturbed by "such activities."

The phrase "in connection with a surface coal mine" apparently supplies a basic parameter for a determination as to the types of activities and areas of land which comprise "surface coal mining operations." [8] This phrase, however, is not expressly defined in the Act or interim regulations, and the sentence of the definition which provides examples of activities conducted "in connection with a surface coal mine" is rather ineffectively drafted:

> Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce *at or near the mine site:* * * *. [Italics supplied.]

Were this sentence more clearly structured, we might more easily rely on it to determine whether the coal processing activities conducted by Western, geographically independent from any particular coal mine, were meant by Congress and the Secretary to be considered "surface coal mining operations" in and of themselves. As the sentence stands, however, its language admits both to the reading that the words "other processing or preparation" are modified by the words "at or near the mine site" and the reading that such activities are not syntactically connected to this qualifying phrase.[9]

[8] Western does not receive any coal from underground coal mines; therefore, we omit in our discussion reference to the language: "or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine." 30 CFR 700.5(1).

[9] It is OSM's position that the language of the definition which embraces Western's activities is: "or other processing or preparation, loading of coal for interstate commerce at or near the mine site." *See* OSM's Brief, filed Mar. 30, 1979, at 8. (It was established at the hearing that Western crushes and loads coal in preparation for its shipment in interstate commerce. *See* Tr. at 16–18; 41–45.) As the text of our opinion suggests, we agree with OSM to the extent that if any part of the subject sentence may be said to embrace Western's activities, it is that part cited to us by OSM.

According to OSM, Western's activities may be said to be conducted "at or near" the mines from which the company receives coal, because the operators of these mines have voluntarily chosen to send their coal to Western's facility rather than somewhere else. OSM's Brief, filed Mar. 30, 1979, at 10. We find the criterion of "economic incentive," suggested by OSM's argument, not supported by the interim regulations as the basis for determining whether a given activity is located "at or near the mine site."

Alternatively, OSM argues that the phrase "at or near the mine site" modifies only the words "loading of coal" and not the full phrase: "the cleaning, concentrating, or other processing or preparation." OSM's Brief, filed Mar. 30, 1979, at 10. Thus, OSM would exercise authority over Western's operations, based on the company's "processing" or "preparation" activities, without regard to the geographical relationship between those and any surface coal mines. In support of this proposition, OSM relies heavily on certain comments published in the Preamble to the permanent regulations. *See id.* at 10–11; OSM's Supplemental Brief, filed Apr. 27, 1979, at 2–4.

We do not find the provisions of the permanent regultaions persuasive or even relevant in the context of this appeal. To begin with, they were not published in their final form

Because of the ambiguous quality of the definition of "surface coal mining operations," we have looked to the legislative history of the Act and to the interim regulatory provisions as a whole to ascertain whether the Secretary intended that activities such as Western's be treated as surface coal mining operations. In this examination, we have found the legislative history to be of no appreciable aid [10] and the interim regulations, as a whole, do not provide us with conclusive guidance as to the nature of the "connection" with a surface coal mine which the Secretary intended to have trigger the application of the interim performance requirements.[11] We have decided to resolve these ambiguities in favor of Western, rather than burden that company with the assumption that the Secretary intended that activities such as those it conducts should be subject to the performance standards of the initial regulatory program.[12]

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until Mar. 13, 1979 (44 FR 14902–15463), whereas the notice of violation under our review was issued on Jan. 25, 1979. Thus, Western did not have the benefit of interpretive comments contained in the Preamble to the permanent regulations when it engaged in the activities which are the subject of the notice of violation. Moreover, we note that there are differences between the permanent regulatory provisions and the interim regulatory provisions which reflect the interpretation of the definition of "surface coal mining operations" which is implemented in the former. *See* comment 8, 44 FR 14915 and 44 FR 15377 (Mar. 13, 1979) (to be codified in 30 CFR 785.21).

[10] Among the contents of the legislative history of the Act that have been considered by the Board, in this context, is a portion of the House Report for H.R. 2 (cited to us by OSM in its Brief, filed Mar. 30, 1979, at 11–12) which provides:

"H.R. 2 is the descendent of a number of bills dating back to the 92d Congress. Although the Congress passed two bills (in the 93d and 94th Congresses), both met a Presidential veto. As new environmental problems were identified and mining practices evolved, the bills were amended so that it can be rationally asserted that H.R. 2 now benefits from a 6-year evolution being 'fine-tuned' and updated as it moved through the legislative process. The fundamental concept of 'the strip mining bill', however, has remained constant. Thus H.R. 2 is like its predecessors in that it would enact a set of national environmental performance standards to be applied to all coal mining operations and to be enforced by the State with backup authority in the Department of the Interior. More specifically, H.R. 2 will implement a national system of coal mining regulation by—

"(1) Covering all coal surface mining (contour, mountain-top, area stripping and open-pit operations) and the surface impacts from underground mines and coal processing; * * *." H.R. Rep. No. 95–218, 95th Cong., 1st Sess. 57 (1977).

This language does refer to "coal processing" as being within the coverage of H.R. 2, from which the Act directly emanated. It does not, however, establish that coal processing which does not occur as part of the complex of activities which physically make up a particular coal mine site is governed by the performance provisions of the Act and interim regulations. *See also* n. 11, *infra*.

[11] While many of the performance requirements of the interim regulations, when read in isolation, appear suited to the types of activities conducted by Western—as a means of controlling the environmental impact of those activities, *see, e.g.*, 30 CFR 715.17, which is the provision Western was cited for violating— many others appear to have as their reference points coal mine sites. *See especially* 30 CFR 715.11(b) and (c) which set forth part of the general performance obligations apparently applicable to *all* surface coal mining operations, including the requirement that copies of a mine map be submitted to the state regulatory authority and OSM).

[12] *See Cole* v. *Young*, 351 U.S. 536, 556 (1956); *F.T.C.* v. *Atlantic Richfield Co.*, 567 F.2d 96, 103 (D.C. Cir. 1977); *Tobin* v. *Edward S. Wagner Co., Inc.*, 187 F.2d 977, 979 (2d Cir. 1951), wherein Circuit Judge Frank stated:

"Beginning at least with Aristotle, it has often been recognized that, as a legislature cannot foresee all possible particular instances to which legislation is to apply, it must therefore be reasonably so interpreted to fill in gaps. * * * But when the legislature dele-

For the foregoing reasons, we hold that Western's river terminal operations do not constitute surface coal mining operations. We therefore reverse the ALJ's decision and remand this case to the Hearings Division for action consistent with this decision.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

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gates to an administrative official the authority, by 'sublegislation', to issue regulations, in order to fill in those gaps, then the regulations, precisely because they particularize, ought not be as generously interpreted as the statute. In fairness to the regulated, the provisions of the regulations should not be deemed to include what the administrator, exercising his delegated power, might have covered but did not cover. * * *" (Footnote omitted.)

This is not to suggest that mere ambiguity alone will yield the same result. We are mindful of what the Supreme Court stated in *Achilli* v. *U.S.*, 353 U.S. 373, 379 (1957), "[o]ur duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of the legislation." In this search for coherence, administrative construction of ambiguous provisions is entitled to great weight. *Consumer Life Ins. Co.* v. *U.S.*, 524 F.2d 1167, 207 Ct. Cl. 638 (1975), *aff'd*, 430 U.S. 725 (1977); *Continental Cas. Co.* v. *U.S. for Use and Benefit of Robertson Lumber Co.*, 305 F.2d 794 (8th Cir. 1962); *cert. denied*, 371 U.S. 922 (1962). The "administrative construction" in the present context is the construction adopted by this Board, unless the Secretary changes the disputed provision. It is our responsibility, just as it is the Court's, to give "coherence * * * within the bounds imposed by a fair reading of the legislation" to ambiguous enactments and regulations. In discharging that duty we can and will attempt to resolve ambiguities by examining other evidence of intent. However, when all aids to construction do not eliminate this ambiguity, as they did not in this case, a similar resolution should not be surprising.

FRANK RULLAND

41 IBLA 207

Decided *June 27, 1979*

Appeal from decision of the Fairbanks District Office, Bureau of Land Management, rejecting in part Native allotment application F-14641.

Set aside and remanded.

1. Administrative Procedure: Generally—Alaska: Native Allotments—Contest and Protests: Generally—Hearings—Rules of Practice: Government Contests

Where the Bureau of Land Management (BLM) determines that an Alaska Native allotment application should be rejected in part because the Native did not use all of the land applied for, the BLM shall initiate a contest proceeding pursuant to 43 CFR 4.451 *et seq.*

2. Alaska: Native Allotments—Alaska: Navigable Waters—Alaska: Statehood Act—Alaska: Tidelands—Public Lands: Generally—Submerged Lands—Submerged Lands Act: Generally

Federal title to land may be lost by erosion, and land which has become submerged under water is no longer subject to disposition under the Alaska Native Allotment Act. The fact that an Alaska Native may have used, occupied, and filed an application for such land when it was dry does not prevent the loss of Federal title to that land by erosion. Neither the Alaska Statehood Act nor the Submerged Lands Act prevents the passage of title to such land to the State.

APPEARANCES: Carmen L. Massey, Esq., Alaska Legal Services Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Frank Rulland has appealed from a decision, dated Sept. 16, 1975, of the Fairbanks District Office, Bureau of Land Management (BLM), which rejected in part his Native allotment application F–14641, which had been filed pursuant to the Alaska Native Allotment Act, ch. 2469, 34 Stat. 197 (1906) (repealed 1971). The decision considered appellant's applications for two parcels of land. Appellant's application for Parcel A included 125 acres, but the District Office found that Mr. Rulland was only using a small part of Parcel A and allowed only 40 acres. The District Office rejected the application for Parcel B because the field report indicated that the land was completely under the water of the Beaufort Sea and that the land now belongs to the State of Alaska pursuant to the Alaska Statehood Act, 72 Stat. 339 (1958), which gave the State title to such submerged land as defined in the Submerged Lands Act, 43 U.S.C. §§ 1301–43 (1976).

[1] While this appeal was pending, the United States Court of Appeals for the Ninth Circuit ruled that "Alaska Natives who occupy and use land for at least five years, in the manner specified in the [Native Allotment] Act and the regulations," are entitled to due process in the adjudication of their applications for allotment of that land. *Pence* v. *Kleppe*, 529 F. 2d 135, 141–42 (9th Cir. 1976). The Department implemented this mandate by requiring BLM to initiate a contest giving an applicant notice of the charges against his/her application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application because of insufficient use and occupancy. *Donald Peters*, 26 IBLA 235, 83 I.D. 308 (1976), *sustained on reconsideration*, 28 IBLA 153, 83 I.D. 564 (1976). Those contest procedures are set forth at 43 CFR 4.451–1 to 4.452–9. In *Pence* v. *Andrus*, 586 F. 2d 733 (9th Cir. 1978), the court held that these procedures comply with the due process requirements mandated in *Pence* v. *Kleppe*, *supra*. Consideration of appellant's appeal was stayed pending resolution of the issues raised in the *Pence* litigation.

The rejection of Parcel B and the partial rejection of Parcel A were predicated on factual determinations. The applicant has not had an opportunity to submit evidence on these factual issues at a hearing. The cases must therefore be remanded to the Bureau for readjudication. Where it is determined that the applications should still be rejected in whole or in part because of the failure of the record to establish the applicant's use and occupancy of the land as required by statute and regulation, BLM should initiate a contest proceeding in accordance with our decision in *Donald Peters*, *supra*.

[2] With respect to Parcel B, appellant asserts that even if the land eroded, his claim of entitlement arising from his prior use and occupancy was preserved by various provisions of the Submerged Lands Act and the Alaska Statehood Act.[1] He asserts that if his land eroded, this occurred only after he had earned his right to it by use and occupancy and after he had filed his application. However, it is not by virtue of the legislation that the land is no longer subject to disposal under the Native Allotment Act. Rather, this result follows from the application of the common law principle that Federal title to public land may be lost by erosion. *J. M. Jones Lumber Co.*, A-30761, 74 I.D. 417 (1967); *see generally* 65 C.J.S. *Navigable Waters* § 87 (1966). Courts have applied the concepts of erosion, accretion, and avulsion, making clear that these principles were not suspended by the Submerged Lands Act or the various statehood acts. *See Oregon ex rel. State Land Board* v. *Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977); *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973); *Hughes* v. *Washington*, 389 U.S. 290 (1967).[2] Such principles are no less applicable in Alaska. *See Sandra L. Lough*, 25 IBLA 96 (1976).

Furthermore, it would not be appropriate to assert that lands in-

[1] Appellant points to a provision of the Alaska Statehood Act in which the United States and Alaska disclaimed right and title to land held by the United States in trust for the Natives. Appellant further cites a provision of the Submerged Lands Act, 43 U.S.C. § 1315 (1976), which provides that nothing in the statute shall affect rights which may have been acquired under any other law of the United States. He points to another provision, 43 U.S.C. § 1313(b) (1976), which excludes from those lands granted to a State any lands beneath navigable waters held for the benefit of any tribes, band, or group of Indians or for individual Indians. However, appellant has initiated no interest which is not subject to loss by erosion. Indeed, even if a patent had been issued while the land was fast land, title conveyed by the patent would be lost by erosion.

The issue may be more fully appreciated if the basic law governing title to submerged land is set forth. It has been long recognized that prior to the admission of a State to the Union, the United States holds title to the lands beneath navigable waters in trust for the future state. *Shivley* v. *Bowlby*, 152 U.S. 1, 49 (1894); *Pollard* v. *Hagan*, 44 U.S. (3 How.) 212 (1845); *Young* v. *Town of Juneau*, 4 Alaska 372 (1911). When territories became states, they received title to submerged land just as the original states held title to their submerged lands. *See Shivley* v. *Bowlby, supra.* Thus, the Submerged Lands Act confirmed the title of submerged lands in existing states and defined the title that future states would acquire. Even though the land was kept in trust for future states, a number of cases recognize that prior to admission of the state, the Government may reserve lands beneath navigable waters so that they do not pass to the state upon attainment of statehood. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970); *United States* v. *City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971); *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946). In each case, the court found an intent to reserve land beneath navigable waters in the instrument of conveyance or reservation. These cases contrast with the instant case where there is no instrument where such an intent can be found. As we noted in the body of the opinion, recognition of such an exception would not be consistent with the intent of the Native Allotment Act.

[2] *Bonelli, supra,* had held that Federal common law rather than State law was to be applied in a dispute between Arizona and a land holder in that State involving a question of title to land which had been the bed of a navigable river. *Corvallis, supra,* overruled *Bonelli* on this point, and held that state law rather than Federal law controlled. *Corvallis* does not preclude the application of Federal common law to lands bordering on oceans, *see Hughes* v. *Washington, supra,* or to questions of title to public lands. *See David A. Provinse,* 35 IBLA 221, 85 I.D. 154 (1978).

The only possibility that submerged lands might be retained in Federal ownership is if such lands were clearly embraced within a Federal withdrawal prior to and at the time of statehood. *See Solicitor's Opinion,* 86 I.D. 151 (1978).

cluded in a Native allotment application are somehow excepted from the application of these common law principles. The type of use and occupancy which the Native Allotment Act sought to protect can no longer be enjoyed if the lands are submerged. Even if title to the land remain in the United States, this same reasoning would impel the rejection of the application pursuant to the Secretary's discretionary authority under the Native Allotment Act, because granting an allotment for submerged land would be inconsistent with the intent and purpose of that statute. If appellant disputes the factual determination that Parcel B is submerged, however, this factual issue may be considered at the hearing.

We are not ruling at this time on the adequacy of appellant's asserted use and occupancy as required by the Native Allotment Act. Resolution of legal issues related to that question will best be made after the hearing where all the facts have been ascertained. The facts should establish the type and extent of the use, whether others may have used and occupied the land, whether there may have been a failure to substantially continue to use or occupy land or an abandonment of the land by the applicant for a substantial period from the time asserted to the date of the application, and all other matters which would show the factual basis for ascertaining whether compliance with the preconditions for granting a Native allotment have been satisfied.

BLM should afford notice of the initiation of the contest proceedings to the State of Alaska and any other person or entity which may possibly have a conflicting interest in the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further adjudication.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

JAMES L. BURSKI,
Administrative Judge.

NEWTON FRISHBERG,
Chief Administrative Judge.

FLOYD L. ANDERSON, SR.

41 IBLA 280

Decided *June 28, 1979*

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-8052.

Affirmed.

1. Alaska: Native Allotments—Settlements on Public Lands—Withdrawals and Reservations: Generally—Withdrawals and Reservations—Effect of

A Native allotment applicant, who was 5 years old at the time when the land was withdrawn from all forms of appropriation, is properly deemed to be incapable as a matter of law of having

exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently the allotment application is properly rejected.

2. Alaska: Native Allotments—Settlements on Public Lands

An allotment right is personal to one who has complied with the laws and regulations. An applicant for a Native allotment may not rely or tack on use and occupancy of the land by his ancestors to establish his right.

3. Alaska: Indian and Native Affairs—Alaska: Land Grants and Selections: Applications—Indian Allotments on Public Domain: Lands Subject to—Indian Allotments on Public Domain: Settlement

Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of Mar. 4, 1927, 43 U.S.C. §§ 316, 316a–316o (1976), does not create any rights by virtue of such settlement under the Alaska Native Allotment Act, 43 U.S.C. §§ 270–1 to 270–3 (1970), repealed by 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease *pro tanto*, but the grazing lease does not preclude the filing of a state selection application which, when filed, segregates the land from all appropriation based upon settlement or location.

4. Administrative Procedure: Hearings—Evidence: Generally—Hearings

Where legal conclusions are reached in an appellate decision upon undisputed facts, and there has been no proffer of further facts which could compel different legal conclusions, no useful purpose would be served for a hearing, and a request therefor is properly denied.

APPEARANCES: Mathew D. Jamin, Esq., Alaska Legal Services Corp., Kodiak, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

Floyd L. Anderson, Sr., has appealed from a decision dated Dec. 12, 1975, by which the Alaska State Office, Bureau of Land Management (BLM), rejected his Native allotment application AA–8052, filed for fractional SW¼NW¼ sec. 29, T. 26 S., R. 20 W., Seward meridian, Alaska, pursuant to the Native Allotment Act of May 17, 1906, *as amended*, 43 U.S.C. § 270–1 (1970), (repealed, except for pending applications, by sec. 18(a), Alaska Native Claims Settlement Act of Dec. 18, 1971, 43 U.S.C. § 1617 (1976)).

The BLM decision recited that the Native Allotment Act applies only to vacant, unappropriated and unreserved public lands in Alaska, and where lands have been segregated or withdrawn, allotment may only be made where the Native made substantial use and occupancy of the land for at least 5 years prior to the effective date of the segregation or withdrawal, and that the land sought by Anderson was withdrawn by Exec. Order No. 8344 of Feb. 10, 1940, from appropriation under the public land laws. The Executive Order did not prohibit issuance of a grazing lease under the Act of Mar. 4, 1927, 43 U.S.C.

§§ 316, 316a–316o (1976); such a grazing lease, A 034760, was issued Jan. 1, 1957, to one DeWitt W. Fields. PLO No. 2417 of June 26, 1961, revoked Exec. Order No. 8344, but did not open the land within any grazing lease to operation of the public land laws. Such lands remained as appropriated and segregated from entry until such time as they are classified as suitable for disposal under the public land laws.

The State of Alaska filed State selection application A 056426 and amended it as of Oct. 29, 1963, to embrace all available land in T. 26 S., R. 20 W. The grazing lease of Fields did not preclude the State selection as the State would accommodate the existing Federal grazing lease by replacement with a State lease. *Harold J. Naughton*, 3 IBLA 237, 78 I.D. 300 (1971).

[1] As the land in issue has not been open to settlement at any time since Feb. 12, 1940, Anderson could initiate no right thereto by settlement, use or occupancy commenced after that date, so his use and occupancy after 1961, as alleged in his application, may not be recognized. Further, it was pointed out that as Anderson was born May 28, 1934, he could not have made any recognizable use of the land before it was withdrawn in 1940. Even taking appellant's claim of occupancy at its face value, we cannot agree that it vested him with any rights to the land at issue. At the time of the withdrawal of Feb. 12, 1940, appellant was 5 years old. We hold that as a matter of law he was too young to have exerted independent use and occupancy of the land to the exclusion of others prior to the withdrawal and consequently his application must be rejected. *James S. Picnalook, Sr.*, 22 IBLA 191 (1975); *Emma Moses*, 21 IBLA 264 (1975).

In *Susie Ondola*, 17 IBLA 359 (1974), we held that: "Assertions to the effect that a child two years of age exerts independent control and use of land, to the exclusion of her parents, siblings and others flies in the face of reason. *Helen F. Smith*, 15 IBLA 301 (1974); *Arthur C. Nelson*, 15 IBLA 76 (1974)."

In *Minnie E. Wharton*, 4 IBLA 287, 79 I.D. 6 (1972), *rev'd on other grounds*, 514 F. 2d 406 (9th Cir. 1975), in discussing the capacity of an infant to be a holder of land in adverse possession, a concept similar to the one here in issue, we stated at 4 IBLA 300, 79 I.D. 12 as follows:

> It does not comport with reason that John Wharton, who was born on the land in 1933 and purportedly lived there until 1966 was, in his childhood, aware of, or concerned with, the ownership of the land. To suggest that he, in 1933 or shortly thereafter, as a baby or young child, was holding the land in open notorious adverse possession, suggests a faculty for comprehension in a baby or young child which flies in the face of reason. The fact that the other appellants, apart from Minnie E. Wharton and John W. Wharton had been born on the land and lived there until they were emancipated, simply does not lend any persuasive force to the assertion that

they held the land in open notorious adverse possession.

We recognize the existence of authority for the proposition that one who has not reached his majority may acquire title to land by adverse possession, 3 AM. JUR., Adverse Possession sec. 131. However, there must be an intention to disseise.

While we recognize that in some circumstances a 5-year-old may be competent as a witness (*See Annot.*, 81 ALR 2d 386, 398–9 (1962)), such a child would be regarded as incapable of committing a tort requiring malice, *e.g.*, libel. *Munden* v. *Harris*, 153 Mo. App. 652, 134 SW 1076 (1911); *Drane* v. *Pawley*, 8 Ky. LR 530 (abstract) (1886). *Cf. Annot.* 2 ALR 2d 1329, 1330 (1948).

The statement of reasons argues that an applicant for a Native allotment may tack on ancestral use of the land to avoid the segregative effect of later withdrawals, such as Exec. Order No. 8344 made in this case; if tacking on is not permitted, PLO No. 2417 revoked Executive Order in 1961, and the failure of the State of Alaska to file a selection application within 6 months during the stated preference right period allowed appellant to establish his allotment, except for the existence of the grazing lease of Fields, which appellant contends could not affect the land he seeks because BLM did not determine the Native use and occupancy prior to the purported issuance of the grazing lease.

[2] At the outset, we point out that the issue of tacking is well settled. An allotment right is personal to one who has fully complied with the law and regulations. An applicant for a Native allotment may not tack on use and occupancy of the land by his ancestors to establish his right. *James S. Picnalook, Sr., supra; Emma Moses, supra; Louis P. Simpson*, 20 IBLA 387 (1975); *Anne McNoise*, 20 IBLA 169 (1975); *Larry W. Dirks*, 14 IBLA 401 (1974). *Cf. United States* v. *Arenas*, 158 F. 2d 730 (1947), *cert. denied*, 331 U.S. 842 (1947); *Woodbury* v. *United States*, 170 F. 302 (8th Cir. 1909).

[3] Similarly, the Department has held that settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of Mar. 4, 1927, 43 U.S.C. §§ 316, 316a–316o (1976), does not create any rights, by virtue of such settlement, under the Alaska Native Allotment Act, 43 U.S.C. §§ 270–1, 270–2, 270–3 (1970), repealed 43 U.S.C. § 1617 (1976), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease. *Harold J. Naughton*, *supra*. Although the existence of a grazing lease, issued under the Act of Mar. 4, 1927, *supra*, is effective to bar settlement of the land covered thereby, it does not preclude the filing of a state selection application for the land which, when filed, segregates the land from all appropriations based upon application or settlement or location. *Id.*

[4] We note that appellant "demands a hearing to show his ancestral use and possession, to demonstrate his own use and to demon-

strate generally that the decision of the Bureau of Land Management in rejecting his application was erroneous." He invokes *Pence* v. *Kleppe* 529 F. 2d 135 (9th Cir. 1976). *See also Pence* v. *Andrus*, 586 F. 2d 733 (9th Cir. 1978).

The legal conclusions reached in this decision are based upon undisputed facts. There has been no proffer of further facts which could compel different legal conclusions. It appears, therefore, that no useful purpose would be served by a hearing and the request therefor is denied. *Arthur C. Nelson*, (*On Reconsideration*), 15 IBLA 76 (1974).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

JOAN B. THOMPSON,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

APPEAL OF ENVIRONMENT CONSULTANTS, INC.

IBCA-1192-5-78

Decided *June 29, 1979*

Contract No. 14-16-0001-5782FA, Fish and Wildlife Service.

Sustained in part.

1. Contracts: Construction and Operation: Changes and Extras

Where the Board finds that the Contracting Officer's Representative required the contractor to expend more effort in field surveys and data collection than required by the contract documents, a constructive change will be found to have occurred.

2. Contracts: Disputes and Remedies: Equitable Adjustments

Where the evidence supports entitlement of a contractor to an equitable adjustment resulting from a constructive change, but fails to establish that all the claimed extra costs were incurred as a direct result of the constructive change, the Board will employ the jury verdict approach in order to determine the appropriate amount to be awarded to the contractor.

APPEARANCES: Messrs. Yan M. Ross, William H. Barrett, Attorneys at Law, Metzger, Shadyac & Schwarz, Washington, D.C., for appellant; Ms. Jean P. Lowman, Mr. Lawrence E. Cox, Government Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Factual and Procedural Setting

On Mar. 20, 1975, a contract was entered into between the United States of America, acting through the Contracting Officer of the Fish and Wildlife Service (FWS), Department of the Interior (Government and Environment Consultants, Inc. (ECI), a Delaware corporation having its principal

place of business at Dallas, Texas. The contract included the general provisions of the standard supply contract Form 32, with two attachments: Exhibit A, "A General Prospectus for Certain Wildlife and Habitat Survey and Inventory Services for American Samoa," and Exhibit B, "A Proposal for a Survey and Inventory of Wildlife and Wildlife Habitat of the Islands of American Samoa" (AF-B).[1]

According to the General Prospectus, Exhibit A of the contract, the purpose of the contract was to obtain "the services of a consultant to complete a basic survey and inventory of the wildlife and wildlife habitat of American Samoa." [2] The need for such a survey was stated to be that it would serve as a threshold for investigations on specific wildlife conservation problems; would provide facts needed by administrators in making judgments on conservation issues; and would pinpoint rare, threatened, or endangered species that may be located on the Islands. It was also pointed out that although American Samoa has not been subjected to extensive habitat degradation, there have been developments which have had adverse impacts; that the population growth from 5,000 in 1900 to 28,000 in 1972 has precipitated problems such as soil erosion, development of adequate supplies of fresh water, garbage disposal, and pollution abatement; and that knowledge of the biotic systems of the Islands must be available if serious detrimental effects are to be avoided in the future.

The contract provided for a performance period of two (2) years; for a contract price of $200,000 with progress payments to be made monthly based upon billings approved by the Project Officer for the Government and with 20 percent retention to be paid at the end of the contract period; for ECI to provide the necessary technical and supervisory personnel, transportation, materials, and equipment to accomplish the objectives as outlined in Exhibits A and B attached to the contract; and for the Government to arrange for the rental of certain equipment and office space from the Territory of American Samoa.

Exhibits A and B of the contract, prepared respectively by the Government and ECI, are practically identical in terms of setting forth the primary and secondary objectives of the contract.[3] However,

[1] Appeal File, Exhibit B.

[2] The General Prospectus contained the following background on American Samoa:

"American Samoa is located at about 14 [degrees] South latitude and 170 [degrees] West Longitude and is comprised of seven islands whose total land area is approximately 76 square miles. The islands are mountainous and jungle covered. They have steep shorelines and rather narrow fringing reefs. The highest elevation on the largest island, Tutuila, is 2,141 feet while the highest elevation in the entire group is found on Ta'u at 3,056 feet. Six of the seven islands are inhabited; the total population consists of about 28,000 Samoans and about 800 people from elsewhere. The yearly average temperature range is between 70 [degrees] F. to 90 [degrees] F., with a humidity of about 80%. The annual rainfall at Pago Pago is about 200 inches with most of this falling from December to March."

[3] The General Prospectus, Exhibit A, prepared by the Government, provides as follows:

"*PRIMARY OBJECTIVES*

there are certain provisions of the contract which play key roles in the resolution of the dispute presented by this appeal.

Paragraph 26, entitled "Representations," on page 4 of the contract, provides as follows:

> The Contractor represents that it is qualified, willing and able to perform the work of this contract and is performing work in a similar or related field. The Contractor shall, as an independent contractor, use its best efforts to supply the necessary personnel, facilities and do all other things *which in its judgment are necessary for or incidental to the performance of the work of this contract which shall be under the supervision of the Project Officer.* The Contractor shall use its best efforts to complete performance of this contract, including preparation of the final technical report, within the estimated costs and period specified. [Italics supplied.]

Paragraph 1, page 1 of the contract designates Mr. Edward S. Marvich as Project Officer for the Fish and Wildlife Service and also states as follows:

> Project Officer for Environment Consultants, Inc., will be:
>
> Dr. Daniel Coffman, Project Administrator, Dallas
>
> Mr. Binion Amerson, Principal Investigator, Samoa

On page 2 of Exhibit A of the contract, there is an unnumbered paragraph entitled, "Description of Work to be Performed." It states as follows:

> *The study* shall utilize procedures which can be repeated by other scientists in later years and *shall conform to accepted standards of scientific excellence.* Plants and animals shall be identified by genus and species, English common names, and Samoan common names. The work will entail year-round field investigation in order that seasonal fluctuations in abundance can be recorded. The end product shall be submission of a comprehensive report of the habitat and wildlife of American Samoa. *It shall be of publishable quality as determined by the U.S. Fish and Wildlife Service,* fully illustrated with maps, photographs, drawings and sketches. [Italics supplied.]

Another significant provision of the contract is designated as paragraph 4 and is found on page 2 of the contract. It reads as follows:

> A Comprehensive Plan must be submitted within four (4) months after effective date of Contract. This Outline must include specific and measurable check points at quarterly intervals to determine progress of study. These plans must meet the approval of the Contracting Officer. Approval or comments will be expressed

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"1. Define the major ecologic types (plant communities) which collectively make up American Samoa.

"a. Describe each generally in terms of soils, moistures, light, slope, altitude, etc.

"b. Identify the plant species which characterize each.

"c. Identify the wildlife species present in each, noting seasonal occupancy and approximate population density for each. Wildlife is defined to include mammals, birds, reptiles and amphibians.

"2. Prepare maps of American Samoa showing the distribution of the ecologic types (1. above).

"3. Describe the roles of disturbances and succession as determinants of plant/animal communities.

"4. Identify and record the status of any species (plant or animal) threatened with extinction or expiration and describe the factor(s) responsible.

"5. Identify management opportunities and options and future research needs.

"SECONDARY OBJECTIVES

"1. Determine the effects on the polynesian rat on turtles and birds at Rose Atoll."

Exhibit B of the Contract, the Proposal prepared by ECI, was nearly the same as Exhibit A with respect to the stated objectives except for minor language differences and except that the fifth primary objectives listed in Exhibit A was listed as the second secondary objective in Exhibit B.

in writing by the Contracting Officer within three (3) weeks of receipt by the Service. Any later changes or additions to study plans must be submitted as an amendment for approval by the Contract Officer prior to effecting the changes. The Service will respond within 10 days after receipt of request.

It is undisputed: that Mr. Marvich was responsible for conceiving and recommending that FWS undertake a survey of the wildlife and wildlife habitat of American Samoa (Tr. 401); that he was instrumental with others in writing the General Prospectus and the objectives contained therein; that after the Contracting Officer, on Dec. 12, 1973, requested proposals from prospective contractors to perform the subject contract, Mr. Marvich served on the FWS Selection Committee which reviewed and ranked the proposals (Tr. 285, 365); that ECI was selected from among seven firms chosen to meet with the Selection Committee, as the most qualified firm responding to the request for proposals (Tr. 29, 286); that the subject contract was the first for which ECI has ever competed in which the price was not discussed until after the contractor was selected; that after considerable negotiations involving revised proposals and budget options, on June 3, 1974, ECI provided FWS a "Description of Services Performed at Various Funding Levels" which compared the amounts of quantitative data collection field work which ECI proposed to undertake for $250,000, $221,066, $610,443, and $800,000 (AP-t, Exh. 1); that ECI was unaware, until well into the negotiations for the final contract price, that the Government's budget for this project was limited to $200,000 (Tr. 177); that it was Dr. Coffman's opinion that the contract price was the minimum which would support the level of effort which would allow fulfillment of the goals and objectives of the Request for Proposal (Tr. 167); and that it was Mr. Marvich who signed the approvals on behalf of FWS with respect to the Preliminary Field Methods and the Refined Field Methods, even though the contract at paragraph 4, called for approval of the Comprehensive Plan by the Contracting Officer (AP-18; AP-21; AF-B).

Contentions of Appellant

The appellant contends that it prepared what were termed "Preliminary Field Methods" and "Refined Field Methods" which constituted the Comprehensive Plan required by paragraph 4 of the contract and which were tantamount, at least, to the specifications for the contract, since the Government had not provided any other specifications explaining what ECI was obligated to do and how it was to be done. The appellant also contends as follows:

1. That in Mar. 1976, the Contracting Officer's Representative (COR), Mr. Marvich, requested ECI to write a mid-project, or annual report, not required under the contract and also that ECI collect extra data outside of and in addi-

tion to the 13 study plots contained in the Refined Field Methods, because Mr. Marvich wanted "precise" estimates of population densities rather than the "approximate" estimates required under the contract;

2. That ECI performed the work requested by the COR, Mr. Marvich, which was not required by the Mar. 20, 1975, contract or the Refined Field Methods;

3. That the extra work consisted of furnishing a mid-project or annual report, performing linear surveys and undertaking 28 study plots not called for in the Refined Field Methods;

4. That ECI's claim for $99,955 represents the expenses which ECI incurred as a result of performing the extra quantitative data collection field work required by the COR in March 1976, and which was not required under the contract; and

5. That ECI is entitled to full payment of its claim because the work it represents was requested by the COR, the work was accepted and ratified by the Contracting Officer and the COR, ECI protested that it was extra work, and the controlling equitable considerations support ECI's claim.

Contentions of the Government

The Government denies that ECI performed extra work, and contends that all work performed by ECI was necessary to fulfillment of its contractual obligation. Its specific contentions are as follows:

1. The contract was a performance contract requiring a study and final report meeting standards of scientific excellence and utilizing procedures which could be subsequently repeated.

2. FWS approval of preliminary and refined field methods did not convert the contract to a "specification" contract.

3. The work ECI claims as "extra" was required by the contract.

4. ECI failed to notify the Contracting Officer that it was performing "extra" work to the prejudice of FWS.

5. ECI has the burden of proof in showing it is entitled to an equitable adjustment.

6. ECI has a higher burden of proof in this matter for it purports to establish its quantum entitlement using a "total time" method, a variation on the total cost method.

By its letter dated Jan. 5, 1977 (which should be Jan. 5, 1978, since it was received by the Contracting Officer on Jan. 9, 1978), ECI presented a formal claim to the Contracting Officer for the alleged extra work in the amount of $91,828. This figure was calculated by adding the salaries expended since the termination date of the contract, Mar. 20, 1977, for ECI's staff personnel, technicians, secretaries, artists, statistician/editors, coordinators, and administrators in the amount of $39,762.49 times the ECI audited and approved overhead rate of 110 percent in effect Mar. 21, 1977, plus 12 percent profit (AF–O). On Jan. 20, 1978, Change

Order No. 1 was executed by the Contracting Officer and Paul de Cerrantes, Vice President of ECI. The primary purpose of the change order was to extend the contract date to Feb. 20, 1978, to allow FWS a review period to determine substantial performance. It also authorized release of 50 percent of the $40,000 retainage on the date of the change order and the remaining 50 percent within 30 days, providing the final report from ECI is accepted (AF-P).

By letter, dated Feb. 17, 1978, the Contracting Officer informed ECI that the FWS staff had made the reviews of the draft report furnished by ECI on Jan. 20, 1978, and based upon those reviews he had determined that the draft report met the substantial performance requirements of Contract No. 14-16-001-5782 FA (AF-Q).

By letter dated Mar. 28, 1978, the Contracting Officer denied the claim of ECI for the increased scope and complexity of the work alleged by ECI to have been ordered by FWS. The ground for the denial was that no additional work had been ordered by either a change order or an extra work order and that sec. 3 of Standard Form 32, General Provisions of the Contract, states, "no payment for extras shall be made unlesss such extras and the price thereof have been authorized in writing by the Contracting Officer." (AF-R). Thereafter, on Apr. 27, 1978, the attorneys for ECI executed a Notice of Appeal addressed to the Secretary of the Interior which was docketed by this Board on May 5, 1978 (AF-S).

Issues Presented on Appeal

1. Whether a constructive change took place in March 1976, midway in the course of performance of the subject contract, entitling appellant to an equitable adjustment for unanticipated, extra costs incurred as a result of the constructive change.

2. If entitled to an equitable adjustment, whether appellant sustained its burden of proof with respect to quantum.

Decision on Entitlement

The determination of a constructive change, in terms of extra work in this case, first of all, depends upon whether measurable work performance was limited by the contract documents. Secondly, it depends upon ECI actually performing work in addition to the contract requirements at the request of the Government, and thirdly, if the extra work was performed, whether the Contracting Officer knew, or should have known, that ECI considered the extra work to be beyond the scope of the contract and expected to be paid for it.[4]

[4] In R. Nash, *Government Contract Changes* (*1975*), at p. 219, the author states:

"The most straightforward type of constructive change occurs when the Government, during contract administration, takes some action which increases the cost of the work, believing the action to be proper under the terms of the contract. If the contractor can later convince contracting officials in the procuring agency or an appeals board that the extra work was not required by the contract, the action will be held to be a constructive change and the contractor will be entitled to compensation for the extra costs that have been incurred.

It is undisputed that the contract called for a Comprehensive Plan to be submitted by ECI for approval by the Contracting Officer; that in response to that requirement, ECI did prepare and submit, and the Government approved over the signature of Mr. Marvich, a document designated as, "Refined Field Methods for a Survey and Inventory of Wildlife and Wildlife Habitat of the Islands of American Samoa" (AP–19; AP–21).[5] It is evident upon reading that document that it detailed the work performance and methodology that ECI would undertake in order to meet its obligations under the subject contract.

For example, at pages 2 and 3, it specified that major community types would be sampled and would include all distinct primary and secondary plant communities; that because of the lack of a large assortment of soil types on Samoa, the major community types are best differentiated by physiographic regions rather than by soil types. Table 1, page 4, shows the three main physiographic features of the Islands to be the Strand Formation with 5 zones, the Forest Formations with 6 zones, and the Summit and Ridge Formations with 2 zones. These 13 zones constituted the major study and sampling units upon which ECI organized and focused its endeavor.[6]

On page 5, the Refined Field Methods states that a number of replicates will be sampled for each major plant community on each Island in order to determine differences between Islands. On pages 7 and 8 is an explanation of sampling methodology. There, among other things, it is stated: that a form of interrupted belt transect will be more reliable than a large single compact plot; that in conjunction with the belt transect, the point-centered quarter method will be utilized for special situations and reconnaissance-type surveys and a single compact plot may be utilized for specialized, discontinuous vegetational areas; and that the belt transect consisting of 10m x 10m (100m2) plots spaced at 10m intervals will be set out in selected representative sampling sites for each major community type.[7]

F.N. 4—Cont'd.

"There are three major issues that arise in such situations:

"1. Can the act of the Government be traced, in some way, to an employee with Contracting Officer authority?

"2. Was the extra work done beyond the requirements of the contract?

"3. Did the contractor take the proper precautions in notifying the Government of the consequences of the act?"

[5] Appellant's Exhibit No. 19 and appellant's Exhibit No. 21.

[6] On pages 2 and 3 of AP–19 is the following explanation:

"Primary communities are those communities, both climax and subclimax but not necessarily virgin, that by their composition and structure are most indicative of the natural vegetation of the Islands of American Samoa. Secondary communities are either man–dominated plant communities resulting from the removal or alteration of the existing natural vegetation or secondary successional communities resulting from past man-influenced or natural disturbances."

[7] Dr. Daniel Coffman, scientist and Project Officer for ECI, testified at transcript pages 182–183 that "ecosystems," "major plant communities," "primary study plots," "community habitats," and "sample sites," are all terms referring to the same areas, but are not synonymous on a biological definition basis. He also pointed out that initially,

We find that the contract documents, including the Refined Field Methods, did limit the work which the Government could reasonably expect ECI to perform for the contract price of $200,000. We also find that after approval by the Government, the Refined Field Methods were tantamount to, and served the same function as, contract specifications. We also find that the Refined Field Methods specified what ECI intended to do and how it intended to do it in meeting the contract objectives, so that any effort required by the Government to be performed by ECI beyond what was specified in that document could reasonably be held to be extra work.

The Government does not deny that ECI performed the work alleged by ECI to be extra. It simply argues that that work was not extra, but was required by the contract to meet the objectives and the standard of "scientific excellence" set forth in the General Prospectus (Govt. Br. pp. 8–9). We reject this argument because the record is clear that the additional work performed by ECI, consisting of linear surveys, additional field collection work, and the mid-project or annual report, were not called for in the Refined Field Methods. Therefore, pursuant to our last above finding, that work was "extra," and we so find.

We now come to a discussion of the third element required before a determination can be made that a constructive change occurred. Did ECI sufficiently notify the Government that it considered the extra work to be beyond the scope of the contract and therefore, compensable? We hold that it did.

The Annual Status Report itself, in the Preface, contained the following sentence: "*Although such a document is not required by the contract*, both parties agreed that the goals of the project would best be served by a compilation of progress and findings of the work to date * * *" (italics supplied) (AP–33). This report was dated April 1976 and was transmitted to FWS by letter from Daniel M. Coffman, Ph. D., addressed to Edward S. Marvich, and dated Apr. 23, 1976 (AP–32).

At the hearing, ECI introduced a memorandum to the file dated Mar. 26, 1976, written by Dr. Coffman and memorializing his trip to Samoa and the March meetings (AP–29). That document was not in any way challenged by the Government. It appears to have been made in the ordinary course of business. We have no reason to doubt its authenticity. It clearly stated that Mr. Marvich was told that the annual report and linear surveys represented effort beyond the scope of either the contract or the Revised Field Methods.[8]

F.N. 7—Cont'd.
there was to be one quadrant or sample plot in each of the 13 major ecosystems, but that after the Preliminary Field Methods (AP–17) had been tested in the field, the methodology was changed to a system of belt transects.

[8] The last two paragraphs of that document (AP–29) are as follows:
"In spite of contractual specifications on the use of plots for data collection, Amerson concurred with Marvich's opinion that transect observations between plot sites would contribute substantially to the quality of the

Dr. Coffman testified, at Tr. 117–118, as follows:

> Q. At the March 19th meeting did Mr. Marvich request that ECI undertake data—quantitative data collection—outside of the thirteen study plots?
>
> A. Yes, he did.
>
> Q. And did you tell him that the quantifying data collection efforts beyond the thirteen study plots was work outside the contract?
>
> A. Yes.

Binion Amerson, the principal investigator for ECI on Samoa, who was present at the Mar. 16–19, 1976, meetings, verified that Dr. Coffman told Mr. Marvich that the additional work and the annual report were not called for in the original contract (Tr. 235).

Mr. Marvich himself, at Tr. 427–428, testified that although Dr. Coffman did not "expressly" tell him on Mar. 19, 1976, that ECI was not required under the contract to write the mid-project report, Dr. Coffman did have such a conversation with him sometime during the March 1976 meetings or subsequently, but he could not recall when. He denied that Coffman and Amerson told him during their meetings in March 1976 on American Samoa that ECI was not required under its contract to undertake linear surveys and additional study plot work (Tr. 381–382). He could not recall whether they did or not (Tr. 430–431), but he testified (Tr. 431) that although he could not recall whether they did or not at the Mar. 19, 1976, meeting, he "believes" they did at some time tell him that the linear surveys and extra study plots were outside the scope of the contract.

[1] From the foregoing and other record evidence,[9] we find that Mr. Marvich, as the COR, was thoroughly familiar with the contract documents, including the Refined Field Methods (RFM) which he had approved; that he was aware of the additional work beyond the scope outlined in the RFM which ECI agreed to undertake and knew, or reasonably should have known, that ECI would not undertake the additional work and incur the additional expense thereof without seeking reimbursement from the Government. We also find that any knowledge of this potential claim acquired by Mr. Marvich was im-

F.N. 8—Cont'd.
data base. Such linear transects would facilitate more accurate extrapolation of distribution and abundance data collected at the site. As a result of this meeting with Ed and at his request, I agreed to the following:

"1. ECI would prepare a mid-project status report detailing progress to date and the direction of future work.

"2. This status report would be used to present the methodology for an enlarged field program. Specifically, while maintaining the present level of effort for data collection at study plots, a series of linear surveys would be conducted on each island at the maximum intensity that ECI's field staff could perform.

"I pointed out to Ed that both the report and linear surveys represented effort beyond the scope of either the contract or revised field methods. Following this meeting, Binion and I worked out an outline for the Mid-project Report. On Friday afternoon I boarded a plane for Hawaii."

[9] The annual report itself (AP–33), in Figures 2 and 3 for the linear surveys, and on page 27 for the extra field work not including the linear surveys, sets forth planned extra work outside the original 13 study plots. And Monthly Progress Report Nos. 14–22, covering the period Apr. 25, 1976 through Dec. 24, 1976, submitted by ECI to Mr. Marvich describe the work of linear surveys and extra study plot work not required by the Refined Field Methods.

puted to the Contracting Officer. In sum, we are of the view that although ECI could have been more articulate in advising the Government of its potential claim for extra costs before undertaking the additional work arising out of the March 1976 meetings, sufficient notice was conveyed to the Government to satisfy the third element for a constructive change.

We hold therefore, that a constructive change took place in March 1976, entitling ECI, the appellant, to an equitable adjustment for unanticipated, extra costs incurred as a result thereof.[10]

Decision on Quantum

Having determined the issue of entitlement, we come now to the question of quantum. What extra costs were incurred by ECI as a result of the constructive change?

At the outset, we observe that ECI, by its letter of Jan. 4, 1978, claimed $91,828 (AF–O). This figure represented ECI's calculation of total salaries expended since Mar. 20, 1977, the original contract completion date, plus overhead at the rate of 110 percent of the total salaries, plus 12 percent profit, less credit for unpurchased boat motors in the amount of $1,692. ECI's Notice of Appeal (AF–S), dated Apr. 27, 1978, claimed the figure of $93,520 for extra work, obviously overlooking the credit for unpurchased boat motors. Its complaint, dated June 5, 1978, claimed again the figure of $93,520 less a $1,692 credit for unpurchased outboard motors. On June 5, 1978, without directly moving to amend its complaint on file with this Board, ECI addressed a letter to the Contracting Officer requesting an amendment to its claim of $8,127.10 resulting in a total amended claim of $99,955.10. The letter explained that the previous claim covered the period from Mar. 20, 1977, to Dec. 30, 1977, and that the amendment extended the claiming period to Jan. 15, 1978. The amendment was acknowledged by the Government in its Answer, dated July 20, 1978, and filed with the Board in response to ECI's complaint.

The evidence presented by ECI on the quantum issue consisted of appellant's Exhibit No. 47, the first page which is entitled, "Comparison of Budget Versus Actual Levels of Effort," and four more pages under the heading "Factual Assessment of Actual Level of Effort," and Dr. Coffman's testimony (Tr. 137–145). At Tr. 138, Dr. Coffman explained that he and several ECI bookkeepers prepared (AP–47) in an attempt to show specifically how dollars were spent on what ECI had contracted to do, and where the dollars were spent on "efforts outside the original contracted level of effort," and then to go through a series of cross-checks and analyses to authenticate that, indeed, these

[10] The Armed Services Board of Contract Appeals has recently granted an equitable adjustment based upon an oral change order of a Government fire official who was neither the Contracting Officer nor the Contracting Officer's Representative. *Brown Construction Co.*, ASBCA No. 22648, Mar. 8, 1979, 79–1 BCA par. 13,745.

numbers *could be* supported by actual records and work experience.

Among other things, the subject exhibit (AP–47) shows 393 man-days expended for 28 extra plots over and above the original 13. It also shows 173 man-days expended for the linear surveys and concludes that the total level of effort for extra contractual field work ordered by FWS equals 565 man-days. It also contains dollars and cents figures for budgeted items and claimed actual expenditures without any positive dollars and cents figures showing actual expenses directly resulting from the extra work caused by the Government. Dr. Coffman's testimony also lacks positive proof of the relationship of the extra contractual work effort and the dollars and cents expenditures therefor.

The Government audit report (Govt. Exh. X) verifies quite closely that ECI expended the total money claimed on the project, but does not support any dollars and cents figures which can be directly attributed to the constructive change.

[2] The Government, in its brief at page 13, correctly points out that ECI's evidence on quantum is but a variation of the total cost approach which this Board has previously disfavored in *Burns Const. Co.*, IBCA–1042–9–74 (Aug. 30, 1978), 85 I.D. 353, 78–2 BCA par. 13,405, where the Board stated:

> The total cost approach is disfavored because it is based on three questionable premises: (1) that the actual cost incurred is the proper cost, (2) that the original bid is a fair approximation of what it would have cost to perform the work had no change occurred, and (3) that the change was the sole cause of the increased costs.

The Government then points out that other factors could have caused cost increases for which the Government is not responsible,[11] and that therefore, the estimate of the claimed extra costs was suspect.

We concur in that appraisal, but add that ECI's cost figures are also suspect because of the rather extensive disparity between its minimum proposal of $250,000 for which it originally estimated it could meet the contract objectives, and yet, when it learned that the FWS was limited by budget restrictions to $200,000, it still represented that, the objective could be met for the lower price.

We are convinced that the evidence in this case supports a substantial equitable adjustment, but are not satisfied that all the claimed costs are attributable to the extra

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[11] These other factors were cited at page 13 of the Government's brief as follows:

"ECI anticipated cooperation from the Government of American Samoa in providing transportation between the islands. (tr 200) This did not materialize and, this caused problems to ECI field personnel (tr 200). ECI had funding problems on the islands which 'seriously' hampered all field operations (ex. BB). The initial staffing plans were not met (ex. CC, 1st para.). One of the professional staff assigned could not do the field work (tr 257; ex. CC, 3rd para.). Personnel unexpectedly left the project (ex. DD). Staffing problems were a concern to the project leader Mr. Amerson (ex. FF). Some field work had to be redone (tr 271; ex. GG)."

contractual work. Thus, we believe the circumstances here dictate the need for and the reasonableness of the jury verdict approach. The Board finds that ECI incurred extra costs in excess of the contract price as a result of the constructive change and is entitled to an equitable adjustment in the sum of $70,000.

DAVID DOANE,
Administrative Judge.

I CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

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